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An Overview of the Inconsistency among the Circuits Concerning the Conflict of Interest Analysis Applied in an ERISA Action with an Emphasis on the Eighth Circuit's Adoption of the Sliding Scale Analysis in Woo v. Deluxe Corporation

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AN OVERVIEW OF THE INCONSISTENCY AMONG THE CIRCUITS CONCERNING THE CONFLICT OF INTEREST ANALYSIS APPLIED IN AN ERISA ACTION WITH AN EMPHASIS ON THE EIGHTH CIRCUIT'S ADOPTION OF THE SLIDING SCALE ANALYSIS IN *WOO v. DELUXE CORPORATION*

I. INTRODUCTION

Congress enacted the Employee Retirement Income Security Act (ERISA)[1] in 1974 to rectify specific defects that limited the effectiveness of the then-existing private retirement system.[2] In an effort to remedy the problem areas, Congress established guidelines in ERISA, including standards for plan design concerning vesting and standards for plan administrators, as well as seeking to protect vested portions of certain retirement plans from premature termination.[3] However, the primary purpose of ERISA was to protect individual pension rights.[4] In this spirit, Congress placed a principal focus on the enforcement effort of potential civil litigation initiated by the Secretary of Labor and, more importantly, plan participants and beneficiaries.[5] Thus, Congress created ERISA to protect the rights of private individuals in benefit plans that were not effectively realized in pre-ERISA legislation.[6]

While ERISA's title seems to indicate that it governs only retirement plans, this massive area of federal legislation broadly envelops other employee benefits such as medical, welfare, and disability insurance plans.[7] Due to their personal nature, denial of these types of benefits by plan administrators has generated a great deal of ERISA litigation.[8] This Note focuses only on the analyses developed by the courts for situations in which a plan administrator, following the denial of plan benefits, is found to have been operating under a conflict of interest. A conflict of interest typically occurs when a plan administrator makes decisions concerning benefit eligibility and also has an interest in the plan which funds the payment of benefits. This is precisely the situation involved in

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1. Employee Retirement Income Security Act of 1974, Pub. L. No. 93-406, 88 Stat. 829 (1974) (codified as amended at 29 U.S.C. §§ 1001-1453 (1994)) [hereinafter ERISA].

2. *See* ERISA, H.R. 93-533, 93d Cong., 2d Sess. (1974), *reprinted in* 1974 U.S.C.C.A.N. 4639, 4640. The defects that concerned Congress related to the gaps in the law and its failure to protect individual pension rights effectively. *See id., reprinted in* 1974 U.S.C.C.A.N. 4639, 4641.

3. *See id., reprinted in* 1974 U.S.C.C.A.N. 4639, 4640.

4. *See id., reprinted in* 1974 U.S.C.C.A.N. 4639, 4639.

5. *See id., reprinted in* 1974 U.S.C.C.A.N. 4639, 4639.

6. *See id., reprinted in* 1974 U.S.C.C.A.N. 4639, 4639.

7. *See* 29 U.S.C. § 1002(1) (1994).

8. *See* H.R. 93-533, *reprinted in* 1974 U.S.C.C.A.N. 4639, 4639.

Woo v. Deluxe Corp.[9] In *Woo*, the Eighth Circuit applied a heightened standard of review in evaluating the plan administrator's denial of Beverly Woo's disability benefits because the court determined that the plan administrator, Hartford, was operating under a conflict of interest.[10]

The statutory language of ERISA does not set out the appropriate standard of review for actions challenging benefit eligibility determinations under § 1132(a)(1)(B).[11] The United States Supreme Court in *Firestone Tire and Rubber Co. v. Bruch*[12] finally resolved this question, holding that the appropriate standard is de novo, unless the language of the plan grants the administrator discretionary authority to determine eligibility for benefits or to construe the terms of the plan.[13] However, since the issue was not directly before it, the Court merely skimmed over the proper analysis for conflict of interest cases.[14] Since *Firestone,* the federal courts have grappled with the appropriate analysis for such situations without further guidance from the Supreme Court. The lack of any clear direction from the Supreme Court has generated inconsistency among the circuits, and, as a result, three tests or analyses have evolved. These tests are: 1) the Restatement test,[15] 2) the sliding scale analysis,[16] and 3) the presumptively void test.[17]

The purpose of this Note is to discuss the post-*Firestone* development of the conflict of interest analysis by providing an overview of the ERISA conflict of interest decisions in each circuit and the evolution of the test it has adopted. This Note also discusses the ERISA conflict of interest analysis in the Eighth Circuit, focusing on *Woo*, the recent decision in which the court adopted the sliding scale analysis.[18] An

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9. 144 F.3d 1157 (8th Cir. 1998).

10. *See* Woo v. Deluxe Corp., 144 F.3d 1157, 1161 (8th Cir. 1998). The court determined that since the plan administrator would receive a direct financial benefit as the plan insurer, it was acting under a conflict of interest. *See id.* However, not all circuits automatically find a conflict of interest based on the mere fact that a plan administrator has some facet of financial gain following a denial of benefits. *See* De Nobel v. Vitro Corp., 885 F.2d 1180, 1191 (4th Cir. 1989) (stating the mere fact that a decision saved a fully-funded plan money does not necessarily support a finding that there was a conflict of interest).

11. *See* ERISA, Pub. L. No. 93-406, § 502(a)(1)(B), 88 Stat. 829 (1974) (codified as amended at 29 U.S.C. § 1132(a)(1)(B) (1994)).

12. 489 U.S. 101 (1989).

13. *See* Firestone Tire and Rubber Co. v. Bruch, 489 U.S. 101, 115 (1989).

14. *See id.* (holding a conflict of interest should be a factor weighed by the court in determining if the plan administrator's decision was an abuse of discretion).

15. *See* RESTATEMENT (SECOND) OF TRUSTS § 187 (1959).

16. *See* Woo v. Deluxe Corp., 144 F.3d 1157 (8th Cir. 1998).

17. *See* Brown v. Blue Cross and Blue Shield of Ala., Inc., 898 F.2d 1556 (11th Cir. 1990), *cert. denied,* 498 U.S. 1040 (1991).

18. *Woo,* 144 F.3d at 1161.

overview of each circuit's conflict of interest analysis demonstrates how fragmented the circuits have become in this area.

Part II of this Note provides a historical background into the congressional intent and purpose of ERISA, as well as a review of the United States Supreme Court's only decision concerning an ERISA conflict of interest analysis.[19] Part III separates the three conflict of interest tests, with an overview of the case law in the circuits that have adopted each respective test. Part IV discusses the evolution of the conflict of interest decisions in the Eighth Circuit, placing emphasis on *Woo*.[20] Part V concludes by addressing the current division and variations in the analyses developed by the circuits for conflict of interest situations and the effect of the *Woo* decision on Eighth Circuit ERISA conflict of interest actions.[21]

II. DEVELOPMENT OF THE CONFLICT OF INTEREST ANALYSIS

The primary function of ERISA is to protect individual rights in employee benefit plans.[22] The legislative history indicates that Congress relied on trust law principles in developing ERISA.[23] Accordingly, the United States Supreme Court in *Firestone* relied on trust law principles when establishing the appropriate standard of review in an ERISA action.[24] The diverse conflict of interest analyses that have evolved are the result of each circuit's individual interpretation of the *Firestone* decision.[25] Thus, although there is an obvious lack of uniformity among the circuits, the decisions reflect a persistent pattern of protecting individual benefit rights.[26]

A. THE ERISA HISTORICAL BACKGROUND REGARDING THE PLAN ADMINISTRATOR

Before the creation of ERISA, the assets of private pension plans were the only large accumulation of funds that had escaped effective federal regulation.[27] Congress determined that the existing legislation,

19. *See generally Firestone*, 489 U.S. at 101.

20. *See generally* Woo, 144 F.3d at 1157.

21. *See generally id.*

22. *See* ERISA, H.R. 93-533, 93d Cong., 2d Sess. (1974), *reprinted in* 1974 U.S.C.C.A.N. 4639, 4639.

23. *See id., reprinted in* 1974 U.S.C.C.A.N. 4639, 4650.

24. *See Firestone*, 489 U.S. at 115.

25. *See id.*

26. *See, e.g.*, Salley v. E. I., DuPont de Nemours & Co., 966 F.2d 1011, 1015 (5th Cir. 1992) (stating although the court generally decides an abuse of discretion based on the information known to the administrator at the time of its decision, an administrator can abuse its discretion by failing to obtain necessary information).

27. *See* H.R. 93-533, *reprinted in* 1974 U.S.C.C.A.N. 4639, 4641.

which was purportedly designed to regulate pension plans and protect plan participants and beneficiaries, had weaknesses and therefore failed to protect individuals adequately.[28] Accordingly, Congress' primary purpose underlying the passage of ERISA was to protect individual pension rights more effectively.[29] In addition, Congress intended for ERISA to create uniformity in decisions and establish minimum standards in administering an ERISA plan.[30]

The declared policy of ERISA is to protect interstate commerce and the interests of participants in employee benefit plans and their beneficiaries.[31] This declaration is accomplished through standards of conduct, obligations for fiduciaries of employee benefit plans, and appropriate remedies and access to the federal courts.[32] There are three basic types of plans: 1) the unfunded plan–in which the plan sponsor's employees are the decision makers and benefits are paid out of the sponsor's general assets; 2) the self-funded plan–in which the assets are held in trust and the plan sponsor's employees are the decision makers; and 3) the funded plan–in which the plan is funded by an insurance policy and the insurance company is the decision maker.[33] A conflict of interest is commonly alleged concerning disputes surrounding an unfunded plan, because the benefits are paid directly from the plan sponsor's assets.[34] ERISA places a strong emphasis on the fiduciary duties of the plan administrator in managing the benefit plan.[35] Further, ERISA provides remedies to plan participants and beneficiaries if a plan administrator breaches a fiduciary duty.[36]

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28. *See id.*, *reprinted in* 1974 U.S.C.C.A.N. 4639, 4642. For a description of the specific weaknesses that concerned Congress, see the discussion of the three federal acts that governed private pension plans prior to the enactment of ERISA. *See infra* pp. 8-10.

29. *See* H.R. 93-533, *reprinted in* 1974 U.S.C.C.A.N. 4639, 4639; *see also* Massachusetts Mut. Life Ins. Co. v. Russell, 473 U.S. 134, 148 (1985) (stating ERISA was enacted "to protect contractually defined benefits"); Shaw v. Delta Airlines, Inc., 463 U.S. 85, 90 (1983) (indicating ERISA was enacted "to promote the interests of employees and their beneficiaries in employee benefit plans").

30. *See* H.R. 93-533, *reprinted in* 1974 U.S.C.C.A.N. 4639, 4643, 4647, 4650. Examples of minimum standards include vesting, protecting the individual decision making freedom essential to pension plans, and supporting the growth and development occurring in the private pension system. *See id.*, *reprinted in* 1974 U.S.C.C.A.N. 4639, 4647.

31. *See* ERISA, Pub. L. No. 93-406, tit. I, § 2, 88 Stat. 829 (1974) (codified at 29 U.S.C. § 1001b(c) (1994)).

32. *See id.*

33. *See* 6 ERISA LITG. REP. 14, 16 (Feb. 1998).

34. *See, e.g.*, Firestone Tire and Rubber Co. v. Bruch, 489 U.S. 101, 105-06 (1989) (noting the plan sponsor also acted as the plan fiduciary, and any benefits paid out of the unfunded benefit plans came directly out of the employer's funds).

35. *See* H.R. 93-533, *reprinted in* 1974 U.S.C.C.A.N. 4639, 4649-51.

36. *See, e.g.*, 29 U.S.C. § 1132(l) (1994) (establishing civil penalties for claims when a fiduciary has breached its fiduciary responsibilities).

Prior to the passage of ERISA, pension plans were regulated by three federal statutes, each of which accomplished different, but related, purposes.[37] These three statutes were the Welfare and Pension Plans Disclosure Act of 1958,[38] the Labor Management Relations Act,[39] and the Internal Revenue Code of 1954.[40] While these acts assisted in regulating pension plans, all had weaknesses which left individuals who participated in such plans vulnerable in vital areas.[41] Thus, Congress believed that more effective legislation was necessary to adequately protect individual pension rights.[42]

The policy of the Welfare and Pension Plan Disclosure Act was to protect the interests of welfare and pension plan participants and beneficiaries through the disclosure of information concerning the plan.[43] This policy was accomplished through disclosure requirements, mandating that the plan administrator compile, file with the Secretary of Labor, and, upon request, provide plan participants and beneficiaries a description and annual report of the plan.[44] Congress determined that the chief procedural weakness of this Act was that it placed the responsibility of managing the plan on the individual employees.[45] In addition, it contained only limited disclosure requirements and wholly lacked any substantive fiduciary standards governing plan administrators.[46] Therefore, the Welfare and Pension Plan Disclosure Act did not adequately regulate and protect individual rights in pension plans.

The Labor Management Relations Act provided guidelines for the creation and operation of pension funds administered jointly by an employer and a union.[47] However, the Act was not intended, nor did it establish, standards for preserving vested benefits, funding adequacy, and protecting the investment or fiduciary principles.[48] Finally, the Internal Revenue Code affected pension plans by retaining in the Internal Revenue Service the power to determine whether a particular pension plan would attain "qualified status," which granted the employer tax deductions for limited contributions made to the qualified plan.[49] The Internal

37. *See* H.R. 93-533, *reprinted in* 1974 U.S.C.C.A.N. 4639, 4641.
38. *See* 29 U.S.C. § 301, *repealed by* Pub. L. No. 93-406, 88 Stat. 851 (1974).
39. *See* 29 U.S.C. § 141 (1994).
40. *See* 26 U.S.C. §§ 401-404, 501-503 (1994).
41. *See* H.R. 93-533, *reprinted in* 1974 U.S.C.C.A.N. 4639, 4642-43.
42. *See id., reprinted in* 1974 U.S.C.C.A.N. 4639, 4643.
43. *See id., reprinted in* 1974 U.S.C.C.A.N. 4639, 4642.
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46. *See id., reprinted in* 1974 U.S.C.C.A.N. 4639, 4642.
47. *See id., reprinted in* 1974 U.S.C.C.A.N. 4639, 4642.
48. *See id., reprinted in* 1974 U.S.C.C.A.N. 4639, 4642.
49. *See id., reprinted in* 1974 U.S.C.C.A.N. 4639, 4642.

Revenue Code, however, only contained safeguards for the security of anticipated benefit rights in private plans, because its primary function was to produce revenue and prevent evasion of tax obligations.[50] Accordingly, neither effectively regulated private pension plans, and more efficient federal legislation was necessary.

An area of congressional concern in the creation of ERISA was the administration and operation of pension plans.[51] Congress expressed a particular interest in fund transactions, the level of responsibility required of the fiduciaries, and the standards of accountability that govern the fiduciaries in the management and disposition of pension funds.[52] Importantly, the ERISA statutory language specifically allows a fiduciary also to serve as an administrator to the benefit plan.[53] Thus, under ERISA, an entity is essentially allowed to wear two hats: that of a plan sponsor (acting in its own interest) and that of a fiduciary (acting in the interests of the plan participants).[54]

A person is deemed a fiduciary within the confines of ERISA when he or she exercises any discretionary authority or control over management of the plan or any authority or control in managing or disposing of its assets.[55] Further, a person is a fiduciary under ERISA if he or she renders investment advice for a fee, has authority to do so, or possesses discretionary authority or responsibility in administering the plan.[56] In sum, the Supreme Court has stated that an individual is a fiduciary to the extent the individual "exercises *any* discretionary authority."[57] A fiduciary has "authority to control and manage the operation and administration of the plan,"[58] and he or she must provide all plan participants with a "full and fair review" of claim denials.[59]

The ERISA section concerning fiduciary responsibilities derived from principles that developed during the evolution of trust law.[60] However, appropriate modifications were made specially to accommodate employee benefit plans.[61] In trust law, for example, the required

50. *See id., reprinted in* 1974 U.S.C.C.A.N. 4639, 4642.
51. *See id., reprinted in* 1974 U.S.C.C.A.N. 4639, 4645.
52. *See id., reprinted in* 1974 U.S.C.C.A.N. 4639, 4645.
53. *See* 29 U.S.C. § 1108(c) (1994).
54. *See id.*
55. *See* 29 U.S.C. § 1002(21)(A) (1994).
56. *See id.*
57. *See* Firestone Tire and Rubber Co. v. Bruch, 489 U.S. 101, 113 (1989) (emphasis added).
58. 29 U.S.C. § 1102(a)(1) (1994).
59. 29 U.S.C. § 1133(2) (1994).
60. *See* ERISA, H.R. 93-533, 93d Cong., 2d Sess. (1974), *reprinted in* 1974 U.S.C.C.A.N. 4639, 4651.
61. *See id., reprinted in* 1974 U.S.C.C.A.N. 4639, 4651.

standard of care for a trustee in the administration of a trust is defined as a duty to "exercise such skill and care as a man of ordinary prudence would exercise in dealing with his own property."[62] These modified principles of trust law employ a twofold duty on every fiduciary in an ERISA plan:

> to act in his relationship to the plan's fund as a prudent man in a similar situation and under like conditions would act, and to act consistently with the principles of administering the trust for the exclusive purposes . . . enumerated, and in accordance with the documents and instruments governing the fund unless they are inconsistent with the fiduciary principles of the section."[63]

The "prudent man" standard of care in ERISA is statutorily defined as "the care, skill, prudence, and diligence under the circumstances then prevailing that a prudent man acting in a like capacity and familiar with such matters would use in the conduct of an enterprise of a like character and with like aims."[64]

Congress desired to create a fiduciary standard to accomplish uniformity in decisions under similar ERISA situations that may otherwise differ from state to state.[65] Congress expected that courts would interpret the prudent man rule and other fiduciary standards while remaining cognizant of the purposes of ERISA.[66] The desired uniformity of decisions was designed to assist administrators, fiduciaries, and participants of employee benefit plans in predicting the legality of proposed actions without requiring research into various state laws.[67] While Congress' intent was to create uniformity in ERISA decisions, the current case law concerning when a plan administrator is operating under a potential conflict of interest is anything but uniform.[68] The responsibility for the lack of uniformity is likely due to the absence of established guidelines in ERISA for evaluating a conflict of interest or the circuits' lack of success in requesting the United States Supreme Court to address the problem.

B. THE APPLICABLE STANDARD OF REVIEW IN ERISA ACTIONS

The text of ERISA is silent as to the appropriate standard of review in claims brought under it; however, the United States Supreme Court

62. RESTATEMENT (SECOND) OF TRUSTS § 174 (1959).
63. H.R. 93-533, *reprinted in* 1974 U.S.C.C.A.N. 4639, 4651.
64. 29 U.S.C. § 1104(a)(1)(B) (1994).
65. *See* H.R. 93-533, *reprinted in* 1974 U.S.C.C.A.N. 4639, 4650.
66. *See id., reprinted in* 1974 U.S.C.C.A.N. 4639, 4650.
67. *See id., reprinted in* 1974 U.S.C.C.A.N. 4639, 4650.
68. *See id., reprinted in* 1974 U.S.C.C.A.N. 4639, 4650.

resolved this question in *Firestone*.[69] Although the Supreme Court answered the threshold question concerning the appropriate standard of review in *Firestone*, inconsistency still persists in conflict of interest situations.[70] The courts have developed modified degrees of the abuse of discretion standard of review for evaluating conflict of interest situations, but given the absence of any appreciable guidance, the application of these modifications varies significantly throughout the circuits.

There are three standards of review applied in ERISA actions: 1) de novo, 2) abuse of discretion, and 3) arbitrary and capricious. The de novo standard of review allows the trial court to determine the issues and rights of the parties in the action as if the suit had originally been filed in that court.[71] The scope of the trial court's inquiry contemplates a review of the entire record and every question that was legitimately raised on the record.[72] Importantly, the trial court is confined to the record made in the case presented in the claims process before the plan administrator.[73] Although the trial court may consider the plan administrator's findings insofar as they may be helpful, it is not bound by the those findings.[74] In sum, under the de novo standard of review, the trial court has the duty to reach an independent conclusion as to the findings without being influenced by the conclusions of the plan administrator.[75]

The two remaining standards, abuse of discretion and arbitrary and capricious, are viewed by the majority of the courts as synonymous and are generally applied interchangeably in ERISA actions.[76] Abuse of discretion ordinarily implies more than merely an error in judgment, and it includes perversity of will, passion, or moral delinquency.[77] It is also

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69. *See generally* Firestone Tire and Rubber Co. v. Bruch, 489 U.S. 101 (1989).

70. *See* Bruch v. Firestone Tire and Rubber Co., 828 F.2d 134 (3d Cir. 1987), *aff'd in part and rev'd in part*, 489 U.S. 101 (1989). In *Bruch*, the Third Circuit listed two situations in which a conflict of interest may arise: 1) if the employer acts as the plan administrator and the plan provides that the employer's contributions are determined by the cost of satisfying plan liabilities in the previous year; or 2) if the plan administrator is also the employer and the plan is unfunded, such that any benefits provided under the plan are paid directly by the employer from general corporate funds. *See id.* at 137-38.

71. *See* 5 C.J.S. *Appeal and Error* § 761 (1993).

72. *See id.*

73. *See id.*

74. *See id.*

75. *See id.*

76. *See* Cox v. Mid-America Dairymen, Inc., 965 F.2d 569, 572 n.3 (8th Cir. 1992) (stating that the difference between the arbitrary and capricious standard and the abuse of discretion standard is a distinction without a difference), *aff'd on appeal after remand*, 13 F.3d 272 (8th Cir. 1993). *But see* Morton v. Smith, 91 F.3d 867, 870 (7th Cir. 1996) (stating the arbitrary and capricious standard is appropriate when the decision is limited only by good faith, but when the plan administrator has discretion to make reasonable constructions of the terms of the plan, the standard of review is abuse of discretion).

77. *See* 1 C.J.S. *Abuse*, at 392 (1985).

described as an act done or step taken outside the regular course of proceedings or beyond the limits of discretion, or an action that is arbitrary and capricious.[78] Significantly, one of the essentials of the abuse of discretion standard is that the appealed decision must plainly appear to effect injustice.[79] A helpful description is: "if reasonable men could differ as to the propriety of the action taken, it cannot be said that the court abused its discretion."[80] However, abuse of discretion does not imply a bad motive, wrongful or ulterior purpose, or willful disregard for the rights of a litigant.[81]

The case that started the wheels turning toward answering the standard of review question was *Bruch v. Firestone Tire and Rubber Company*.[82] In *Bruch*, the Third Circuit held that when an employer acts as the administrator of an unfunded employee benefit plan, and as such is the sole source of funding for the plan, its decision to deny benefits should be subject to de novo review.[83] In reaching this conclusion, the court reasoned that because the plan was controlled entirely by the employer, rather than by a group evenly divided between the employer and employees, and since every dollar provided in benefits was a dollar spent by the employer, there was no assurance that the employer would be impartial in its decisions.[84] Conversely, other circuits were utilizing a more rigorous version of the arbitrary and capricious standard of review in analogous situations.[85] In an attempt to resolve the question concerning the appropriate standard for reviewing an ERISA claim filed under § 1132(a)(1)(B),[86] the United States Supreme Court granted certiorari.[87]

In *Firestone*, Firestone Tire ("Firestone") wore two hats, acting as both the plan administrator and the plan fiduciary for three pension and welfare benefit plans for its employees.[88] Firestone was the sole source of funding for the benefit plans and did not establish separate trust funds out of which benefits under the plan were paid.[89] Accordingly, these

78. *See id.* at 393.
79. *See id.*
80. *See id.* at 394 n.37.
81. *See id.* at 392-93.
82. 828 F.2d 134 (3rd Cir. 1987), *aff'd in part and rev'd in part*, 489 U.S. 101 (1989).
83. *See* Bruch v. Firestone Tire and Rubber Co., 828 F.2d 134, 144-45 (3d Cir. 1987), *aff'd in part and rev'd in part*, 489 U.S. 101 (1989).
84. *See id.* at 144.
85. *See id.* at 139 (citing Harm v. Bay Area Pipe Trades Pension Plan Trust Fund, 701 F.2d 1301, 1305 (9th Cir. 1983)).
86. *See* ERISA, Pub. L. No. 93-406, § 502(a)(1)(B), 88 Stat. 829 (1974) (codified as amended at 29 U.S.C. § 1132(a)(1)(B) (1994)). Section 1132(a)(1)(B) affords a civil cause of action to a plan participant or beneficiary to recover benefits, enforce rights, or clarify rights to future benefits due under the terms of the plan. *See id.*
87. *See Bruch*, 828 F.2d at 134, *cert. granted*, 485 U.S. 986 (1988).
88. *See* Firestone Tire and Rubber Co. v. Bruch, 489 U.S. 101, 105 (1989).
89. *See id.*

ERISA-governed employee benefit plans were "unfunded."[90] Firestone sold its plastics division, at which time several of its employees sought severance benefits under the termination pay plan provided by Firestone.[91] Firestone denied the employees benefits on the grounds that the sale of the plastics division did not constitute a "reduction in force," as required by the plan language.[92] The employees followed the denial of benefits with a class action suit, which was eventually appealed to the United States Supreme Court.[93]

The Supreme Court recognized that the statutory language of ERISA did not set forth an appropriate standard of review for claims filed by plan participants or beneficiaries to recover benefits, enforce rights, or clarify rights to future benefits under the terms of an ERISA plan.[94] In the absence of an express standard of review, federal courts had previously adopted through analogy the arbitrary and capricious standard derived from a provision of the Labor Management Relations Act (LMRA), the standard applied to all plan administrators' decisions.[95] Early on, the courts looked to the LMRA for direction in developing a standard of review because the LMRA and ERISA have nearly identical duties of loyalty to plan participants and both require that the fiduciary act for the sole and exclusive benefit of plan participants.[96] In comparing the LMRA to ERISA, the Supreme Court found that a wholesale adoption of the LMRA arbitrary and capricious standard in ERISA was unwarranted because the LMRA did not effectively protect individual pension rights, a primary focus of ERISA.[97] Further, since the primary distinction between the two acts is the jurisdictional basis, LMRA

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90. *See id.*

91. *See id.*

92. *See id.* at 106.

93. *See id.*

94. *See id.*, at 109; *see also* 29 U.S.C. § 1132(a)(1)(B) (1994).

95. *See Firestone*, 489 U.S. at 109; *see also* Labor Management Relations Act, ch. 120, 61 Stat. 136, 157 (1947) (codified as amended at 29 U.S.C. § 186(c) (1994)) [hereinafter LMRA]. As previously indicated, the LMRA was one of three federal statutes that governed pension plans prior to the enactment of ERISA. *See* ERISA, H.R. 93-533, 93d Cong., 2d Sess. (1974), *reprinted in* 1974 U.S.C.C.A.N. 4639, 4641.

96. *See* Struble v. New Jersey Brewery Employees' Welfare Trust Fund, 732 F.2d 325, 333 (3d Cir. 1984). The LMRA imposes a duty of loyalty on a fund representative by permitting employer contributions to a welfare fund only if it is used for the sole and exclusive benefit of employees. *See* 29 U.S.C. § 186(c)(5). Similarly, ERISA requires a fiduciary to exercise his or her duties with respect to the plan solely in the interest of the participants and beneficiaries and for that exclusive purpose. *See* 29 U.S.C. § 1104(a)(1) (1994).

97. *See Firestone*, 489 U.S. at 109. Congress did not intend to constrict the common law rights of employees when enacting ERISA. *See id.* at 114. The Supreme Court stated that a blanket adoption of the arbitrary and capricious standard would afford less protection to plan beneficiaries than they enjoyed before ERISA was enacted. *See id.*

principles did not support an adoption of the arbitrary and capricious standard in connection with § 1132(a)(1)(B).[98]

In dismissing the LMRA standards, the Supreme Court considered the legislative history of ERISA and recognized that its language and terminology were premised on trust law.[99] Thus, in determining the appropriate standard of review for claims under § 1132(a)(1)(B), the Supreme Court relied on trust law principles for guidance.[100] The Supreme Court noted, for instance, that well-settled trust law principles point to a de novo standard of review in analyzing benefit eligibility determinations based on plan interpretations.[101] However, when a trustee exercises discretionary powers, trust law provides for a deferential standard of review.[102] The Supreme Court concluded, therefore, that since ERISA abounds with trust law language and terminology, the de novo standard of review from trust law was consistent with the pre-ERISA judicial interpretation of employee benefit claims.[103]

Accordingly, the Supreme Court established that challenges to denials of benefits asserted under § 1132(a)(1)(B) are to be reviewed de novo.[104] However, if the plan grants discretionary authority to the ad-

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98. *See id.* at 110. The LMRA does not provide for review of decisions by a trustee. *See id.* at 109. Thus, the arbitrary and capricious standard was adopted not only as a standard of review, but, more importantly, as a way of exercising jurisdiction over suits. *See* 29 U.S.C. § 186(c); *see also* Van Boxel v. Journal Co. Employees' Pension Trust, 836 F.2d 1048, 1052 (7th Cir. 1987) (stating when a plan provision under LMRA had the effect of denying a benefit application unreasonably, or as it evolved, arbitrarily and capriciously, courts held that the plan, as structured, was not for the sole and exclusive benefit of the employees and, therefore, the denial was a violation of 29 U.S.C. § 186(c)(5)); John A. McCreary, Jr., Comment, *The Arbitrary and Capricious Standard Under ERISA: Its Origins and Application*, 23 DUQ. L. REV. 1033, 1037-41 (1985). Conversely, ERISA explicitly provides for a civil cause of action against a plan administrator and fiduciary to redress a decision by the administrator for noncompliance with the benefit plan or a breach of fiduciary duty. *See* 29 U.S.C. § 1132(a).

99. *See Firestone*, 489 U.S. at 110.

100. *See id.* at 111.

101. *See id.* at 112.

102. *See id.* at 111 (citing RESTATEMENT (SECOND) OF TRUSTS § 187 (1959) ("Where discretion is conferred upon the trustee with respect to the exercise of a power, its exercise is not subject to control by the court, except to prevent an abuse by the trustee of his discretion.")); *see also* GEORGE GLEASON BOGERT & GEORGE TAYLOR BOGERT, THE LAW OF TRUSTS AND TRUSTEES § 560, at 193-208 (West rev. 2d ed. 1980) (discussing a trustee's abuse of discretion). In addition, prior to the enactment of ERISA, claims challenging a plan administrator's denial of benefits were governed by contract law. *See Firestone*, 489 U.S. at 112. Therefore, if the plan had not provided the administrator with discretionary or final authority to construe unclear terms, the court reviewed the claim as a typical contract claim, referring to the plan terms and the intent of the parties. *See id.* at 112-13. Thus, the court reviewed acts of the plan administrators under a de novo standard. *See id.* However, if the plan conferred discretionary authority to the plan administrator, the court gave deference to the administrator's decisions. *See* Lowry v. Bankers Life and Cas. Retirement Plan, 871 F.2d 522, 524 (5th Cir.), *cert. denied*, 493 U.S. 852 (1989); *see also* Smith v. New England Tel. & Tel. Co., 246 A.2d 697, 698 (N.H. 1968) (holding the arbitrary and capricious standard was appropriate where a plan provided the committee authority to determine conclusively all questions arising in the administration of the plan).

103. *See Firestone*, 489 U.S. at 112.

104. *See id.* at 115.

ministrator or fiduciary to construe its terms, the applicable standard of review is the abuse of discretion standard.[105] The Supreme Court clearly stated that it made its decision irrespective of the motives or possible conflicts of interests of a plan administrator, and it rejected the Third Circuit's focus on the impartiality or motives of the plan administrator.[106] Significantly, the Court held that if the plan provides discretion to the administrator or fiduciary who is operating under a conflict of interest, the conflict must be considered a factor in deciding whether there was an abuse of discretion.[107] Since the *Firestone* plan did not provide the plan administrator with discretionary authority, the Supreme Court held that de novo was the appropriate standard of review.[108]

Although the Supreme Court intended to resolve the questions surrounding the appropriate standard of review for claims filed under § 1132(a)(1)(B) of ERISA, it failed to provide clear direction for the lower courts in analyzing situations in which the plan administrator is operating under a conflict of interest because that particular issue was not directly before the Court.[109] Thus, the Supreme Court left unanswered the transition from finding that a conflict of interest exists to determining the degree of the abuse of discretion standard to be applied.[110] The courts have split in their interpretation of the Supreme Court's statement in *Firestone*[111] and in doing so have strayed far from the congressional goal of uniformity in ERISA decisions.[112]

While the United States Supreme Court established the appropriate standard of review in ERISA claims generally, several sub-issues have arisen in the conflict of interest cases which have contributed to the confusion and the lack of uniformity in ERISA decisions among the circuits.[113] For instance, the courts are split as to what language in the plan is adequate to extend discretionary authority to the plan administrator[114]

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105. *See id.*

106. *See id.*

107. *See id.* (quoting RESTATEMENT (SECOND) of TRUSTS § 187 cmt. d). The exact quote is: "Of course, if a benefit plan gives discretion to an administrator or fiduciary who is operating under a conflict of interest, that conflict must be weighed as a 'factor in determining whether there is an abuse of discretion.'" *Id.*

108. *See id.* at 112. The termination plan in question did not grant the administrator any power to construe certain terms or have any language that eligibility determinations are to be given deference. *See id.*

109. *See id.* at 115. For examples of situations in which a conflict of interest would exist, see *infra* p. 14 and note 69.

110. *See* 6 ERISA LITG. REP. 14, 15 (Feb. 1998).

111. *See Firestone*, 489 U.S. at 115.

112. *See* ERISA, H.R. 93-533, 93d Cong., 2d Sess. (1974), *reprinted in* 1974 U.S.C.C.A.N. 4639, 4650.

113. *See* 6 ERISA LITG. REP. at 14-15.

114. *See id.* at 14; *see also* Mitchell v. Eastman Kodak Co., 113 F.3d 433, 439 (3d Cir. 1997)

and what exactly qualifies as a conflict of interest on the part of the plan administrator.[115] In addition, it appears that courts, in an attempt to avoid reconciling and applying the conflict of interest analysis, strive to avoid finding conflict, especially in cases involving self-funded plans or where the conflict is too remote to warrant finding a conflict of interest.[116] These splits facilitate the courts' contrasting analyses. Further, in the absence of any clear guidance and through numerous individual interpretations of the *Firestone* decision, the courts have developed differing tests applicable to conflict of interest situations.[117]

III. THE TESTS

Three tests have evolved for evaluating a situation in which the plan administrator is operating under a conflict of interest. The first is the Restatement test, which mirrors section 187 of the Restatement (Second) of Trusts.[118] Section 187 of the Restatement lists factors and commentary to assist in determining whether a trustee abused its discretion.[119]

The second test is the sliding scale analysis, utilized, with some variations, by the majority of the circuits.[120] The sliding scale analysis applies a modified arbitrary and capricious standard.[121] However, the amount of deference afforded the administrator's decision is lessened based on the degree to which the interests of the administrator are adverse to the

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(holding that a broad grant of discretionary authority to the administrator is sufficient to preclude de novo review); Wildbur v. ARCO Chemical Co., 974 F.2d 631, 636 (5th Cir. 1992) (holding discretionary authority cannot be implied and the administrator is afforded no discretion to determine eligibility of benefits or interpret the plan unless the plan language expressly confers that authority); Scalamandre v. Oxford Health Plans (N.Y.), Inc., 823 F. Supp. 1050, 1060 (E.D.N.Y. 1993) (holding that the appropriate standard was de novo because the plan did not contain an explicit provision granting it discretionary authority to interpret the terms of the plan).

115. *See* Brown v. Blue Cross and Blue Shield of Ala., Inc., 898 F.2d 1556, 1561-62 (11th Cir. 1990), *cert. denied*, 498 U.S. 1040 (1991). In *Brown*, the court held that the plan administrator had an inherent conflict of interest since it was the insurance company that administered the policy and it incurred a direct expense in determining benefits in favor of the plan participants. *Id.* Conversely, in *Chojnacki v. Georgia-Pacific Corp.*, the court adopted a quasi de minimus test in determining if the plan administrator was acting under a conflict of interest. Chojnacki v. Georgia-Pacific Corp., 108 F.3d 810, 815-16 (7th Cir. 1997). In so doing, the court held that even though it was an unfunded plan, the administrator was an officer of defendant subsidiary companies and any benefits paid would come directly from defendant's pocketbook, the defendant was not acting under a conflict of interest since the potential benefits paid were minuscule in proportion to the net revenue of the company. *See id.*

116. *See* 6 ERISA LITG. REP. at 16; *see also* Buckley v. Metropolitan Life, 115 F.3d 936, 939-40 (11th Cir.), *reh'g denied*, 129 F.3d 617 (11th Cir. 1997) (holding no conflict of interest existed since the defendant incurred no direct expense in paying benefits or a direct benefit in denial of claims); *Mitchell*, 113 F.3d at 437 n.4 (finding no conflict of interest because although the plan was self-funded, the defendant would incur no direct expense in paying benefits).

117. *See* Firestone Tire and Rubber Co. v. Bruch, 489 U.S. 101 (1989).

118. *See* RESTATEMENT (SECOND) OF TRUSTS § 187 cmt. d (1959); *see also* Sullivan v. LTV Aerospace and Defense Co., 82 F.3d 1251 (2d Cir. 1996).

119. *See* RESTATEMENT (SECOND) OF TRUSTS § 187 cmt. d.

120. *See* Ellis v. Metropolitan Life Ins. Co., 126 F.3d 228, 233 (4th Cir. 1997).

121. *See id.* at 233.

interests of the plan participants and beneficiaries.[122] Therefore, the arbitrary and capricious standard is based on a "sliding scale" in proportion to the amount of conflict at issue.[123]

The third test is the presumptively void test, applied in only a few circuits.[124] Generally, the presumptively void test applies a heightened arbitrary and capricious standard.[125] However, this test is distinctive because it is based on a burden-shifting framework.[126] Once the plan beneficiary demonstrates that the administrator has a conflict of interest, the burden shifts to the administrator to show its discretionary interpretation of the plan was not tainted by self interest.[127] Thus, the development and application of three different tests to an ERISA conflict of interest situation has created a diverse range of decisions.

A. THE RESTATEMENT TEST

The Restatement test mirrors section 187 of the Restatement (Second) of Trusts.[128] Importantly, under the Restatement, a conflict of interest is only one of six factors relevant to a court in determining if the trustee has abused its discretion.[129] While the de novo standard is applied in evaluating ERISA claims, if the plan confers discretion on the administrator in determining eligibility for benefits or to construe the terms of the plan, the arbitrary and capricious standard is applied.[130] However, the Restatement applies the de novo standard when the plaintiff proves that the administrator's decision was influenced by a conflict of interest or an improper motive.[131] As a result, the administrator's decision is afforded no deference.

In *Firestone*, Justice O'Connor quoted language from the Restatement in an apparent attempt to supply direction for determining the appropriate standard of review to be applied in an ERISA conflict of

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122. *See id.*

123. *See id.*

124. *See* Brown v. Blue Cross and Blue Shield of Ala., Inc., 898 F.2d 1156 (11th Cir. 1990), *cert. denied*, 498 U.S. 1040 (1991).

125. *See id.*

126. *See id.* at 1566.

127. *See id.*

128. *See* RESTATEMENT (SECOND) OF TRUSTS § 187 cmt. d (1959).

129. *See id.* The Restatement factors for determining whether a trustee abused its discretion are: 1) the extent of the discretion conferred on the trustee by the terms of the trust, 2) the purposes of the trust, 3) the nature of the power, 4) the existence or non-existence, definiteness or indefiniteness of an external standard that the reasonableness of the trustee's conduct is judged, 5) the motives of the trustee in exercising or refraining from exercising the power, and 6) the existence or nonexistence of a conflicting interest in the trustee conflicting to that of the beneficiaries. *See id.*

130. *See* Firestone Tire and Rubber Co. v. Bruch, 489 U.S. 101, 115 (1989).

131. *See* Sullivan v. LTV Aerospace and Defense Co., 82 F.3d 1251, 1256 (2d Cir. 1996).

interest situation.[132] The critical language of this comment is that a "conflict must be weighed as 'a factor[] in determining whether there is an abuse of discretion.'"[133] While instructive, this comment is misleading regarding the actual function of section 187 of the Restatement because it tends to lead the reader to believe that the Restatement utilizes a weighing test, such that a conflict of interest alone is not dispositive.[134] It also implies that there is a weighing impact for determining the abuse of discretion, irrespective of whether the administrator was influenced by the conflict.[135] However, this is not the case under the Restatement.

In fact, the language of the Restatement indicates that determining whether a conflict of interest exists is directly related to a finding that the trustee is acting under an improper motive.[136] If the trustee is deemed to have acted with an improper motive, the abuse of discretion standard drops away and the decision is reviewed under the de novo standard of review.[137]

Although it does not use the phrase, the Second Circuit is the only circuit that has adopted a test mirroring section 187 of the Restatement.[138] The Second Circuit has viewed the above-quoted language from *Firestone* as suggesting that an intermediate standard of review is applied to ERISA conflict of interest situations.[139] In *Sullivan v. LTV Aerospace and Defense Co.*[140] the court held that the test for determining whether the administrator's interpretation of the plan is arbitrary and capricious is twofold.[141]

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132. *See Firestone*, 489 U.S. at 115.

133. *Id.* (quoting RESTATEMENT (SECOND) OF TRUSTS § 187 cmt. d); *see also* 6 ERISA LITG. REP. 14, 17 (Feb. 1998).

134. *See Firestone*, 489 U.S. at 115; RESTATEMENT (SECOND) OF TRUSTS § 187 cmt. d.

135. *See* RESTATEMENT (SECOND) OF TRUSTS § 187 cmt. d.

136. *See id.* at cmt. g; *see also* 6 ERISA LITG. REP. 14, 16 (Feb. 1998).

137. *See* RESTATEMENT (SECOND) OF TRUSTS § 187 cmt. g. Instructively, this comment states that the court will control the exercise of power by a trustee where he or she acts from an improper motive, even though he or she is not dishonest, when that motive furthers a purpose other than that of the trust. *See id.* By "control," the writers of the Restatement indicate that the court will "interpose." *See id.* The term "interpose" has been interpreted to mean that if the decisionmaker is acting from an improper motive, the court will no longer pay attention to the decisionmaker's findings and will instead apply a de novo standard of review. *See* 6 ERISA LITG. REP. at 16.

138. *See* Sullivan v. LTV Aerospace and Defense Co., 82 F.3d 1251, 1255-56 (2d Cir. 1996). In establishing the two-step analysis, the court in *Sullivan* relied on the analysis in *Pagan v. Nynex Pension Plan*, which held that a decision was not arbitrary and capricious because the plaintiff failed to establish how the conflict affected the reasonableness of the decision. *Sullivan*, 82 F.3d at 1255 (citing Pagan v. Nynex Pension Plan, 52 F.3d 438, 443 (2d Cir. 1995)). Further, the *Sullivan* court applied the standard of *Firestone*, which held that a conflict of interest is a factor to be weighed by the court in determining whether the administrator's decision was an abuse of discretion. *Sullivan*, 82 F.3d at 1255; *see also Firestone*, 489 U.S. at 115.

139. *See* Elsroth v. Consolidated Edison Co. of New York, Inc., 10 F. Supp. 2d 427, 434 (S.D.N.Y. 1998) (quoting *Firestone*, 489 U.S. at 115).

140. 82 F.3d 1251 (2d Cir. 1996).

141. *See* Sullivan v. LTV Aerospace and Defense Co., 82 F.3d 1251, 1255 (2d Cir. 1996).

The court must first inquire whether the decision by the administrator was reasonable in light of possible competing interpretations of the plan.[142] For example, certain terms of the plan could be interpreted with different meanings, thereby affecting the plan participant or beneficiaries' benefit eligibility with a resulting financial benefit to the administrator.[143] Thus, the court must decide, while considering alternative interpretations, whether the administrator's final decision was reasonable.[144] Second, the court must consider whether the evidence shows that the administrator was actually influenced by the conflict.[145] If the court determines that the administrator was, in fact, influenced by the conflict of interest, the normal deference accorded the administrator's decision drops away, and the court interprets the plan under the de novo standard of review.[146]

In the Second Circuit, the plaintiff carries the burden of proving by a preponderance of the evidence that a conflict of interest affected the plan administrator's decision.[147] However, the administrator carries the burden of establishing that the plan confers on him or her discretionary authority for decisions concerning benefits.[148] When applying the arbitrary and capricious standard, the court may overturn a decision to deny

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142. *See id.* In *Pagan*, the court held "[w]here it is necessary for a reviewing court to choose between two competing yet reasonable interpretations of a pension plan, this Court must accept that offered by the administrators." *Pagan*, 52 F.3d at 443 (citing Jordan v. Retirement Comm. of Rensselaer Polytechnic Inst., 46 F.3d 1264, 1273 (2d Cir. 1995)). However, the plaintiff in *Pagan* argued for enforcement of the doctrine of *contra proferentum*. *See id.* This doctrine advances the premise that when one party is responsible for drafting an instrument, in the absence of evidence indicating the intent of the parties, any ambiguity is resolved against the drafter. *See id.* (citing O'Neil v. Retirement Plan for Salaried Employees of RKO Gen., Inc., 37 F.3d 55, 61 (2d Cir. 1994)). However, the *Pagan* court noted that the doctrine of *contra proferentum* would be applicable only when the court reviews an ERISA plan de novo. *See id.*

143. *See Sullivan*, 82 F.3d at 1256.

144. *See id.* The court also noted that the administrator's interpretation cannot be deemed arbitrary and capricious simply because the plaintiffs offered a plausible alternative interpretation. *See id.*

145. *See id.* at 1255-56; *see also Pagan*, 52 F.3d at 443 (holding that a reasonable interpretation of the plan will stand unless the participants can show that the alleged "conflict affected the reasonableness of the Committee's decision").

146. *See Sullivan*, 82 F.3d at 1256.

147. *See id.* at 1259. *But see* Brown v. Blue Cross and Blue Shield of Ala., Inc., 898 F.2d 1157, 1566-67 (11th Cir. 1990), *cert. denied*, 498 U.S. 1040 (1991) (holding when a plan beneficiary establishes a conflict of interest on the part of the fiduciary, the burden shifts to the fiduciary to prove its interpretation of the plan was not tainted by self-interest). In *Sullivan*, the court rejected the burden-shifting concept from *Brown*, indicating that it "nullifies the deference traditionally afforded to plan administrators under the arbitrary and capricious standard." *Sullivan*, 82 F.3d at 1259; *Brown*, 898 F.2d at 566-67.

148. *See* Scalamandre v. Oxford Health Plans (N.Y.), Inc., 823 F. Supp. 1050, 1059 (E.D.N.Y. 1993). Further, the court in *Scalamandre* held that any ambiguities in determining if the plan administrator is conferred discretionary authority in the plan is construed in favor of the party seeking judicial review. *Id.* (citing Arthur v. Metropolitan Life Ins. Co., 760 F. Supp. 1095, 1098 (S.D.N.Y. 1991)).

benefits only if it was "without reason, unsupported by substantial evidence or erroneous as a matter of law."[149] In making this determination, the court must limit its scope of review to the record before the administrator when its decision was made.[150] Conversely, under the de novo standard of review, the court has discretion to admit additional evidence, but it must not do so in the absence of good cause.[151]

Thus, where the terms of the plan grant the administrator discretionary authority, the arbitrary and capricious standard applies, and the Restatement test places a positive duty on the plaintiff to establish that the plan administrator was actually influenced by an alleged conflict of interest when making its decision regarding benefit eligibility.[152] Once the plaintiff has established the conflict of interest by a preponderance of the evidence, the court interprets the plan de novo and the arbitrary and capricious standard no long applies.[153] This test appears to be a way to determine fairly what is actually a conflict of interest, because the plaintiff must present evidence that there is a conflict and that the conflict affected the administrator's benefit eligibility decision.[154] The parties are thereby afforded an opportunity to explain the circumstances surrounding the decision rather than being presumed to have an inherent conflict of interest merely by virtue of their position or status.[155]

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149. *Pagan*, 52 F.3d at 438 (citing Abnathya v. Hoffmann-La Rouche, Inc., 2 F.3d 40, 45 (3d Cir. 1993)); *see also* Bowman Transp., Inc. v. Arkansas-Best Freight Sys., Inc., 419 U.S. 281, 285 (1974) ("[a] reviewing court must consider whether the decision was based on a consideration of the relevant factors and whether there has been a clear error of judgment").

150. *See* Miller v. United Welfare Fund, 72 F.3d 1066 (2d Cir. 1995) (following the majority of circuits in concluding that the reviewing court is limited to the administrative record under the arbitrary and capricious standard); Durr v. Metropolitan Life Ins. Co., 15 F. Supp. 2d 205 (D. Conn. 1998) (noting that under the arbitrary and capricious standard, the reviewing court is limited in its scope of review to the administrative record before the administrator when its decision was made).

151. *See* DeFelice v. American Inter'l Life Assurance Co. of N.Y. 112 F.3d 61, 66 (2d Cir. 1997) (expanding Masella v. Blue Cross and Blue Shield of Conn., Inc., 936 F.2d 98, 103-05 (2d Cir. 1991) (holding additional evidence may be considered upon de novo review of an issue of plan interpretation)). In *DeFelice*, the court held that when the court reviews an administrative decision under a plan that does not grant discretion, the review is de novo and limited to the record in front of the claims administrator unless the court finds good cause to consider additional evidence. *See id.* at 66-67. An established conflict of interest is considered good cause warranting admission of additional evidence. *See id.* at 67. Additionally, the court held that the plaintiff does not have to establish the second element of the Restatement test, that the conflict caused actual prejudice, in order for the court to find the conflict to be good cause. *See id. But see* Perry v. Simplicity Engineering a Div. of Lukens Gen. Indus., Inc., 900 F.2d 963, 966-67 (6th Cir. 1990) (holding no additional evidence is admissible beyond the administrative record because the court should not become a substitute for plan administrators).

152. *See Sullivan*, 82 F.3d at 1259.

153. *See id.* at 1256.

154. *See id.* at 1256-57. In *Sullivan*, the plaintiff established sufficient evidence that the plan administrative committee were employees of the employer and thus owed a fiduciary duty to the employer. *See id.* at 1256. Further, the plan was unfunded, meaning all benefits paid would be a direct company expense. *See id.* The financial status of the company at the time of plaintiff's claim was poor and the committee members were aware of this when they made eligibility decisions. *See id.*

155. *See id.* at 1255. In *Sullivan*, the court noted that finding an inherent conflict existed between

However, the majority of the circuits have adopted the sliding scale analysis when addressing such situations. [156]

B. THE SLIDING SCALE ANALYSIS

The sliding scale analysis utilizes the arbitrary and capricious standard when the plan language grants the administrator discretionary authority to determine claim eligibility or to construe the terms of the plan.[157] However, the normal amount of deference afforded the administrator's decision is tempered on a sliding scale according to the degree of conflict under which the administrator is determined to be laboring at the time of its decision.[158] A plan administrator has a duty to act solely in the interest of the plan participants and beneficiaries; thus, under the sliding scale analysis, if a court determines that the administrator may be acting for other purposes, such as self-interest, then the degree of deference applied to its decision is lessened.[159] There are some circuits that have developed and follow a more generally accepted sliding scaling analysis, while other circuits have modified the test and adopted a hybrid of the sliding scale analysis. Accordingly, there is a lack of uniformity even among the circuits that are purportedly applying the same test.

1. *The Traditional Sliding Scale Analysis*

The traditional sliding scale analysis has been adopted by the Fourth, Fifth, Seventh, and Tenth Circuits. Although these circuits are theoretically utilizing the same test to analyze ERISA conflict of interest cases, each circuit has customized its analysis. Therefore, each circuit is discussed individually.

a. Fourth Circuit

The Fourth Circuit has developed a more "traditional" sliding scale analysis, modifying the arbitrary and capricious standard of review.[160] In the Fourth Circuit, a court must initially determine de novo, whether

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the fiduciary role and the profit-making objective of an insurance company makes a highly deferential standard of review inappropriate. *See id.*

156. *See, e.g.*, Doyle v. Paul Revere Life Ins. Co., 144 F.3d 181, 184 (1st Cir. 1998) (holding that when a plan administrator acts under a conflict of interest, the arbitrary and capricious standard is applied with "more bite," emphasizing reasonableness); Doe v. Group Hospitalization & Med. Serv., 3 F.3d 80, 87 (4th Cir. 1993) (stating when a decision by a fiduciary exercising discretion will further the financial interests of the fiduciary, the court will not act as deferentially as would otherwise be appropriate).

157. *See* Ellis v. Metropolitan Life Ins. Co., 126 F.3d 228, 232 (4th Cir. 1997).

158. *See id.*

159. *See* 29 U.S.C. § 1104 (1994).

160. *See Ellis*, 126 F.3d at 233.

the terms of the plan prescribe the benefit or whether the plan confers on the administrator discretionary authority to make a determination of the benefit.[161] If the plan confers discretion, the court must determine, again de novo, whether the administrator acted within the scope of its discretion in making its decision.[162] Finally, if the administrator acted within the scope of discretion, the court will review the merits of the decision for an abuse of discretion.[163]

The appropriate standard of review is thus determined by the language of the plan.[164] If the plan language grants the administrator discretionary authority, then the arbitrary and capricious standard of review is applied.[165] The Fourth Circuit requires no magic words in the plan; rather, the grant of discretionary authority need only appear on the face of the plan documents and must afford the administrator the power to construe disputed terms or resolve disagreements over benefit eligibility.[166] Conversely, if the plan does not grant the plan administrator discretionary authority, the appropriate standard of review is de novo.[167] If the plan administrator is operating under a conflict of interest, that conflict must be weighed as a factor in determining whether the plan administrator abused its discretion.[168] The conflict of interest analysis is applied on a case-by-case basis to lessen the deference normally afforded the administrator's decision under the arbitrary and capricious standard, but only to the extent necessary to counteract any influence resulting from the conflict.[169]

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161. *See* Haley v. Paul Revere Life Ins. Co., 77 F.3d 84, 89 (4th Cir. 1996).

162. *See id.*

163. *See id.*

164. *See* Firestone Tire and Rubber Co. v. Bruch, 489 U.S. 101, 115 (1989); *see also* De Nobel v. Vitro Corp., 885 F.2d 1180, 1187 (4th Cir. 1989).

165. *See Ellis*, 126 F.3d at 232 (citing *Firestone*, 489 U.S. at 115).

166. *See De Nobel*, 885 F.2d at 1187. In *De Nobel*, the plaintiff argued that since nowhere in the plan was the administrator expressly granted "discretionary authority" by the presence of the word "discretion," the de novo standard should be applied. *Id.* at 1186-87. The court, however, refused to engage in "semantic hairsplitting" and found that the broad language of the plan conferring discretion was sufficient to trigger the arbitrary and capricious standard. *See id.*

167. *See* Bedrick v. Travelers Ins. Co., 93 F.3d 149, 152 (4th Cir. 1996) (stating as a general matter ERISA plans are subject to de novo review).

168. *See Ellis*, 126 F.3d at 233 (quoting *Firestone*, 489 U.S. at 115). The mere fact that a decision saved a fully-funded plan money does not necessarily support a finding that there was a conflict of interest. *See De Nobel*, 885 F.2d at 1191.

169. *See Ellis*, 126 F.3d at 233 (quoting Doe v. Group Hospitalization & Med. Serv., 3 F.3d 80, 87 (4th Cir. 1993)); *see also Bedrick*, 93 F.3d at 152. In *Bedrick*, the court stated that when a fiduciary exercises discretion in interpreting a disputed term of a plan and one interpretation will further the financial interests of the fiduciary, the court will not act as deferentially as would otherwise be appropriate. *Bedrick*, 93 F.3d at 152 (quoting Bailey v. Blue Cross & Blue Shield of Va., 67 F.3d 53, 56 (4th Cir. 1995), *cert. denied*, 516 U.S. 1159 (1996)). In these instances, the deference will be lessened to the degree necessary to neutralize any influence resulting from the conflict. *See id.*

Thus, even though the court will not, under any circumstances, deviate from the abuse of discretion standard, the court will modify the standard according to a sliding scale.[170] Under this deferential standard, the court will not disturb the administrator's decision if it is reasonable, even though the court would have reached a different conclusion.[171] The decision is reasonable if it is "the result of a deliberate, principled reasoning process and if it is supported by substantial evidence."[172] Further, under the arbitrary and capricious standard, the scope of the court's review is limited to the record before the administrator.[173] However, if the court is reviewing the administrator's decision under the de novo standard, the scope of review permits the court, in its discretion, to allow additional evidence not before the plan administrator at the time of its decision.[174]

In determining whether a plan administrator abused its discretion, the Fourth Circuit in *Haley v. Paul Revere Life Insurance Company*[175] adopted a modified version of the six factors enlisted in the Restatement.[176] These factors are: 1) the scope of the discretion conferred; 2) the purpose of the plan provision granting discretion; 3) any external standard relevant in exercising discretion; 4) the administrator's motives; and 5) any conflict of interest that the administrator operates under when making decisions.[177] These factors are applied selectively to the extent each is relevant to the specific situation before the court.[178]

Further, in order to escape a finding of a conflict of interest, a fiduciary must act as though he or she is free of the interests that conflict

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170. *See Ellis*, 126 F.3d at 233. The more incentive exhibited by the administrator for self-benefit by a certain interpretation for benefit eligibility, the more objectively reasonable the decision must be and the more substantial the evidence must be to support it. *See id.*

171. *See id.* (citing *Doe*, 3 F.3d at 85); *see also* RESTATEMENT (SECOND) OF TRUSTS § 187 cmt. e (1959) ("[t]he mere fact that if the discretion had been conferred upon the court, the court would have exercised the power differently, is not a sufficient reason for interfering with the exercise of the power by the trustee").

172. *Ellis*, 126 F.3d at 232 (citing Brogan v. Holland, 105 F.3d 158, 161 (4th Cir. 1997)).

173. *See* Berry v. Ciba-Geigy Corp., 761 F.2d 1003, 1006-07 (4th Cir. 1985) (holding the court improperly admitted additional evidence that was not before the plan administrator when reviewing the decision under the arbitrary and capricious standard).

174. *See* Quesinberry v. Life Ins. Co. of N. Am., 987 F.2d 1017, 1025 (4th Cir. 1993). Importantly, the *Quesinberry* court indicated that the reviewing court should exercise its discretion and only allow additional evidence when the circumstances indicate that such evidence is necessary to conduct an adequate de novo review of the benefit decision. *See id.* If additional evidence is not necessary for an adequate review, the court should only look to the evidence before the administrator at the time of the determination. *See id.*

175. 77 F.3d 84, 89 (1996)

176. *See* Haley v. Paul Revere Life Ins. Co., 77 F.3d 84, 89 (1996); *see also* RESTATEMENT (SECOND) OF TRUSTS § 187 cmt. d.

177. *See Haley*, 77 F.3d at 89.

178. *See id.*

with the beneficiaries.[179] While ERISA does tolerate a conflict of interest when the plan administrator is also the plan insurer, the conflict present by the virtue of this relationship must not infect the fiduciary's duty to act solely in the interest of the plan participants and beneficiaries and for the exclusive purpose of providing benefits and administering the plan.[180] Accordingly, the fiduciary must act with undivided loyalty to the plan participants in a manner consistent with that mandated duty.[181]

In summary, if the plan administrator is granted discretionary authority to determine eligibility or construe the terms of the plan, the applicable standard of review is abuse of discretion.[182] However, if the plan administrator is found to be operating under a conflict of interest, the abuse of discretion standard is modified on a sliding scale according to the degree the administrator's interest conflicts with the interests of the plan participants and beneficiaries.[183]

b. Fifth Circuit

The Fifth Circuit has described the arbitrary and capricious standard as a "range" rather than a point, which in effect creates a sliding scale of judicial review of a trustee's decision.[184] In adopting the sliding scale analysis, the Fifth Circuit recognized that an alleged conflict of interest does not change the standard of review.[185] While discretionary authority cannot be implied, but must be expressly conferred in the plan language, the Fifth Circuit does not require the word "discretion" actually to

179. *See* Doe v. Group Hospitalization & Med. Serv., 3 F.3d 80, 87 (4th Cir. 1993). *Doe* elaborates on a fiduciary's conflict of interest by stating that "[e]ven the most careful and sensitive fiduciary in those circumstances may unconsciously favor its profit interest over the interests of the plan, leaving beneficiaries less protected than when the trustee acts without self-interest and solely for the benefit of the plan." *Id.* at 86-87.

180. *See* 29 U.S.C. § 1104(a)(1)(A) (1994); *see also* Bedrick v. Travelers Ins. Co., 93 F.3d 149, 154 (4th Cir. 1996) (stating ERISA demands undivided loyalty by the fiduciary to the plan participants and there is no balancing of interests); Pappas v. Reliance Standard Life Ins. Co., 20 F. Supp. 2d 923, 929 (E.D. Va. 1998) (holding that when the plan fiduciary is also the plan insurer, this conflict must not infect the fiduciary duty imposed under ERISA).

181. *See Bedrick*, 93 F.3d at 154.

182. *See id.*

183. *See id.*

184. *See* Lowry v. Bankers Life and Cas. Retirement Plan, 871 F.2d 522, 525 n.6 (5th Cir.), *cert. denied*, 493 U.S. 852 (1989) (citing Van Boxel v. Journal Co. Employees' Pension Trust, 836 F.2d 1048, 1052 (7th Cir. 1987)). In *Van Boxel*, the court provided guidance in the use of the sliding scale analysis, stating that the "more penetrating the greater is the suspicion of partiality, less penetrating the smaller that suspicion is." 836 F.2d at 1052-53. In addition, the abuse of discretion and arbitrary and capricious standards are used interchangeably in the Fifth Circuit. *See* Wildbur v. ARCO Chem. Co., 974 F.2d 631, 635 n.7 (5th Cir. 1992). The difference between the standards is seen as one of semantics rather than substance. *See id.*

185. *See* Salley v. E.I. DuPont de Nemours & Co., 966 F.2d 1011, 1015 (5th Cir. 1992). The court quoted *Firestone Tire and Rubber Co. v. Bruch* for the premise that a conflict of interest must be weighed as a factor in determining whether there was an abuse of discretion. Firestone Tire and Rubber Co. v. Bruch, 489 U.S. 101, 115 (1989).

appear in the document.[186] Rather, the courts are directed to focus on the breadth of the administrator's power and his or her ability to determine benefit eligibility or to construe the terms of the plan.[187] Thus, if the plan language does not expressly confer discretionary authority to the plan administrator, the de novo standard of review is applied in reviewing the administrator's denial of benefits.[188] Alternatively, if discretion is expressly granted to a plan administrator, the decision is reviewed under the abuse of discretion standard.[189] If, however, the administrator is determined to be operating under a conflict of interest, then the standard of review is modified to a sliding scale abuse of discretion standard.[190]

In the Fifth Circuit, application of the abuse of discretion standard involves a two-step analysis.[191] First, a decision must be made concerning the proper legal interpretation of the plan.[192] In reaching this decision, the court must consider: 1) whether the administrator gave the plan uniform construction; 2) whether the interpretation is consistent with a fair reading of the plan; and 3) any unanticipated costs resulting from different interpretations of the plan.[193] Second, if the administrator did not construe the plan according to the plan's legal interpretation, the court must determine whether the administrator's decision was an abuse of discretion.[194] There are three important factors in this step of the analysis: "1) the internal consistency of the plan under the administrators' interpretation; 2) any relevant regulations formulated by the appropriate administrative agencies; and 3) the factual background of the determination and any inferences of lack of good faith."[195]

Although an incorrect interpretation of the plan by the administrator does not alone establish an abuse of discretion, there is a strong indication that the administrator's action was arbitrary and capricious if the decision is in direct conflict with the express plan language.[196] Follow-

186. *See Wildbur*, 974 F.2d at 636-37.

187. *See id.* at 637 (quoting Block v. Pitney Bowes, Inc., 952 F.2d 1450, 1453 (D.C. Cir. 1992)).

188. *See id.* at 636 (quoting *Firestone*, 489 U.S. at 115).

189. *See* Sweatman v. Commercial Union Ins. Co., 39 F.3d 594, 597-98 (5th Cir. 1994).

190. *See Wildbur*, 974 F.2d at 638 (instructing courts to evaluate inferences of a lack of good faith on the part of the administrator on a sliding scale).

191. *See* Jordan v. Cameron Iron Works, Inc., 900 F.2d 53, 56 (5th Cir.), *cert. denied*, 498 U.S. 939 (1990). This multi-step analysis originated in *Dennard v. Richards Group, Inc.* Dennard v. Richards Group, Inc. 681 F.2d 306, 314 (5th Cir. 1982).

192. *See Wildbur*, 974 F.2d at 637.

193. *See Jordan*, 900 F.2d at 56.

194. *See Wildbur*, 974 F.2d at 637.

195. *See id.* at 638; *see also* Batchelor v. International Brotherhood of Elec. Workers Local 861 Pension and Retirement Fund, 877 F.2d 441, 445 (5th Cir. 1989) (quoting *Dennard*, 681 F.2d at 314).

196. *See id.* at 445 (quoting *Dennard*, 681 F.2d at 314).

ing the Supreme Court's holding in *Firestone*, any potential conflict of interest must be weighed as a factor in determining whether the plan administrator abused its discretion.[197] Therefore, the presence of a conflict of interest triggers the sliding scale abuse of discretion standard.[198]

Generally, the court will rely only on the information before an administrator at the time of its decision in determining whether that decision was arbitrary and capricious.[199] The Fifth Circuit has recognized that an administrator can abuse its discretion by failing to obtain the information necessary to make a reasonable decision.[200] The Fifth Circuit also allows a trial court to consider evidence outside the administrative record in determining whether the plan administrator abused its discretion in making a benefit determination.[201]

Accordingly, the Fifth Circuit utilizes a "traditional" sliding scale analysis when reviewing the decision of a plan administrator who is afforded discretionary authority under the plan and is operating under a conflict of interest.[202] A two-step process has been adopted, with several distinct factors to assist the courts in determining whether the administrator's decision was, in fact, an abuse of its discretion.[203] Thus, the Fifth Circuit is unique in that it allows the court to review additional information not before the plan administrator at the time of its decision.[204]

c. Seventh Circuit

Interestingly, the Seventh Circuit adopted the sliding scale analysis in a conflict of interest situation even prior to the Supreme Court's

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197. *See* Sweatman v. Commercial Union Ins. Co., 39 F.3d 594, 599 (5th Cir. 1994). In *Sweatman*, the court held that the administrator did not abuse its discretion by choosing to use the independent medical consultant's opinion over the position of the treating physicians. *Id.* at 602.

198. *See Wildbur*, 974 F.2d at 638.

199. *See* Salley v. E.I. DuPont de Nemours & Co., 966 F.2d 1011, 1015 (5th Cir. 1992). In *Wildbur*, the court stated that in determining any inferences of a lack of good faith, it may review evidence that was not presented to the administrator. 974 F.2d at 638. This is especially true since the courts use a sliding scale to evaluate inferences of lack of good faith. *See id.*

200. *See Salley*, 966 F.2d at 1015. In *Salley*, the court held that DuPont had abused its discretion because it relied upon opinions by independent physicians who neither obtained the medical records nor examined the patient. *Id.* By deviating from the attending physician's opinion, DuPont incurred a duty to investigate further the medical necessity of continued in-patient hospitalization. *See id.* at 1016. Importantly, the court rejected the "treating physician rule," which requires the court to defer to a patient's treating physician's testimony unless there is substantial evidence contradicting his testimony. *See id.* (relying on the rule utilized by the court in *Jones v. Sullivan*, 949 F.2d 57, 59 (2d Cir. 1991)). In rejecting the treating physician's rule in ERISA cases, the court reasoned that the treating physician had a "clear and strong" conflict of interest because he would stand to profit greatly if the court found that benefits should not be terminated. *See id.*

201. *See Wildbur*, 974 F.2d at 639.

202. *See* Lowry v. Bankers Life and Cas. Retirement Plan, 871 F.2d 522, 525 n.6 (5th Cir.), *cert. denied*, 493 U.S. 852 (1989).

203. *See* Dennard v. Richards Group, Inc., 681 F.2d 306 (1982).

204. *See Wildbur*, 974 F.2d at 639.

Firestone decision.[205] In determining the appropriate standard of review to analyze an ERISA administrator's denial of benefits, the first inquiry made by the court is whether the plan contained language granting discretionary authority to the plan administrator.[206] The court will make this finding under the de novo standard, as in any typical contract claim.[207] There is no requirement that the plan language contain an "explicit" grant of discretionary authority to trigger the arbitrary and capricious standard, nor are any magic words necessary.[208] In addition, the terms "interpret" and "construe" in a plan are viewed interchangeably when determining whether discretion is granted.[209] The amount of deference the administrator is provided under the plan will determine the amount of judicial deference applied to the administrator's decision.[210]

The administrator's decision will not be disturbed under the arbitrary and capricious standard unless it is "downright unreasonable."[211] In other words, the administrator's denial of benefits will be upheld under the arbitrary and capricious standard if it is "based on a reasonable interpretation of the relevant plan documents"[212] or is "made

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205. *See* Van Boxel v. Journal Co. Employees' Pension Trust, 836 F.2d 1048, 1052-53 (7th Cir. 1987); *see also* Firestone Tire and Rubber Co. v. Bruch, 489 U.S. 101, 115 (1989). In *Van Boxel*, the court held that under the arbitrary and capricious standard, there may be a "sliding scale of judicial review of trustees' decisions." 836 F.2d at 1052. Thus, the trustees' decision is given less deference based on the more the trustees' impartiality can be fairly questioned. *See id.* at 1053.

206. *See* Donato v. Metropolitan Life Ins. Co., 19 F.3d 375, 379 (7th Cir. 1994).

207. *See* Mers v. Marriott Int'l Group Accidental Death and Dismemberment Plan, 144 F.3d 1014, 1019-20 (7th Cir.), *cert. denied*, 119 S. Ct. 372 (1998) (quoting Bechtold v. Physicians Health Plan of N. Ind., Inc., 19 F.3d 322, 325 (7th Cir. 1994)).

208. *See Donato*, 19 F.3d at 379 (citing Sisters of the Third Order of St. Francis v. Swedish American Group Health Benefit Trust, 901 F.2d 1369, 1371 (7th Cir. 1990) for denial of this proposition). In *Donato*, the plan's language, "[a]ll proof must be satisfactory to us," was sufficient to trigger the arbitrary and capricious standard. *Id.*

209. *See* Chojnacki v. Georgia-Pacific Corp., 108 F.3d 810, 815 (7th Cir. 1997) (citing C. A. May Marine Supply Co. v. Brunswick Corp., 557 F.2d 1163, 1165 (5th Cir. 1977) (stating "construe" and "interpret" are often used synonymously)). These terms are important because in *Firestone*, the United States Supreme Court held that the plan language must give the fiduciary authority to "determine eligibility for benefits or to construe the terms of the plan." *Firestone*, 489 U.S. at 115.

210. *See* Cozzie v. Metropolitan Life Ins. Co., 140 F.3d 1104, 1107 (7th Cir. 1998) (citing Morton v. Smith, 91 F.3d 367, 870 (7th Cir. 1996)); *see also* Chalmers v. Quaker Oats Co., 61 F.3d 1340, 1344 (7th Cir. 1995) (stating the more discretion conferred upon the fiduciary, the more deference the subsequent decision is allowed) (citing Exbom v. Central States, Southeast and Southwest Health and Welfare Fund, 900 F.2d 1138 (7th Cir. 1990)).

211. *See Chojnacki*, 108 F.3d at 816 (citing Fuller v. CBT Corp., 905 F.2d 1055, 1058 (7th Cir. 1990)).

212. *See* Cuddington v. Northern Ind. Pub. Serv. Co. (NIPSCO), 33 F.3d 813, 816 (7th Cir. 1994) (quoting Shull v. State Mach. Co. Employees Profit Sharing Plan, 836 F.2d 306, 308 (7th Cir. 1987)); *see also Exbom*, 900 F.2d at 1143. In *Exbom*, the court held that under the arbitrary and capricious standard, the denial of benefits will not be set aside if it is "based on a reasonable interpretation of the plan documents" or if the decision is based "on a consideration of the relevant factors" that embody the "important aspects of the problem." *Id.* (citing Reilly v. Blue Cross and Blue Shield United of Wis., 846 F.2d 416, 420 (7th Cir.), *cert. denied*, 488 U.S. 856 (1988)). In addition, if the trustee makes "an informed judgment and articulates an explanation for it that is satisfactory in light of the relevant facts,

rationally and in good faith."[213] Similar to the Fifth Circuit, the Seventh Circuit has described the arbitrary and capricious standard as a "range" rather than a "point."[214] Courts are to consider several factors in determining whether the administrator acted arbitrarily and capriciously: "the impartiality of the decisionmaking body, the complexity of the issues, the process afforded the parties, the extent to which the decision makers utilized the assistance of experts where necessary, and finally the soundness of the fiduciary's ratiocination."[215]

Once a court makes its decision concerning discretionary authority, it must then determine if the administrator operated under a conflict of interest.[216] The Seventh Circuit recognizes that while a conflict of interest does not change the standard of review applied to a plan administrator's decision, it does, however, cause the arbitrary and capricious standard to be applied with "more bite."[217] Thus, the more serious the conflict, the less deference the court affords the administrator's decisions.[218]

The mere fact that a plan administrator receives a financial benefit from denial of a claim is not an automatic conflict of interest in the Seventh Circuit.[219] First, there is a presumption that a fiduciary is acting

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i.e., one that makes a 'rational connection' between the issue to be decided, the evidence in the case, the text under consideration, and the conclusion reached, then the trustee's decision is final." *Id.* (citing Smart v. State Farm Ins. Co., 868 F.2d 929, 936 (7th Cir. 1989)).

213. *See* Hightshue v. AIG Life Ins. Co., 135 F.3d 1144, 1147 (7th Cir. 1998) (quoting Brown v. Retirement Comm. of Briggs & Stratton Retirement Plan, 797 F.2d 521, 529 (7th Cir. 1986), *cert. denied*, 479 U.S. 1094 (1987)). In *Hightshue*, the court rejected the plaintiff's assertion that the doctrine of *contra proferentum*, which would require that ambiguities in a document be construed against the drafter, should be adopted in ERISA cases. *Id.* at 1149. Instead, when the review by the court is deferential, the administrator may conclusively interpret ambiguous plan terms and the court will accept these conclusions so long as they are reasonable interpretations. *See id.* This doctrine, however, is applicable when the administrator's decision is reviewed under the de novo standard of review. *See Morton*, 91 F.3d at 871 n.1.

214. *See* Van Boxel v. Journal Co. Employees' Pension Trust, 836 F.2d 1048, 1052 (7th Cir. 1987). In *Van Boxel*, the court recognized that while purporting to apply the arbitrary and capricious standard uniformly, the sliding scale analysis is more penetrating when the suspicion of partiality is greater and less penetrating when the suspicion is smaller. *Id.* at 1052-53.

215. *Chalmers*, 61 F.3d at 1344 (quoting *Exbom*, 900 F.2d at 1142); *see also Chojnacki*, 108 F.3d at 816 (stating that inconsistent interpretations of the plan is a consideration in determining if an administrator acted unreasonably).

216. *See Chojnacki*, 108 F.3d at 815 (citing Firestone Tire and Rubber Co. v. Bruch, 489 U.S. 101, 115 (1989)).

217. *See id.*; *see also Van Boxel*, 836 F.2d at 1052 (applying the sliding scale based upon the suspicion of the partiality of the administrator).

218. *See Chojnacki*, 108 F.3d at 815. For example, the court in *Chalmers* held no conflict of interest existed because the impact of the claim on the company was not significant. *Chalmers*, 61 F.3d at 1344. Thus, the greater the impact on the company's welfare and the more motivated the company to deny the claim, the less deference is given the administrator's decision. *See id.*

219. *See* Mers v. Marriott Int'l Group Accidental Death and Dismemberment Plan, 144 F.3d 1014, 1020 (7th Cir.), *cert. denied*, 119 S. Ct. 372 (1998) (finding no conflict of interest since the defendant was listed as a "Fortune 500" company and the plaintiff's claim was minuscule in comparison to the defendant's bottom line); *Chalmers*, 61 F.3d at 1345 (holding no conflict of interest because the denied claim paled in comparison to company revenues and denying benefit claims is a poor business decision). *But see* Hightshue v. AIG Life Ins. Co., 135 F.3d 1144, 1148 (7th Cir. 1998) (finding a

neutrally unless a plaintiff establishes through specific evidence that an actual bias or a significant conflict existed.[220] Second, the Seventh Circuit deferred to ERISA § 1108(c)(3), which specifically allows an employer to appoint its own officers to administer an ERISA plan even if the company is a party in interest.[221] The Seventh Circuit implied from § 1108(c)(3) that ERISA contemplates less neutrality of plan administrators than is required in a judicial forum.[222] Accordingly, the fact that a party acts as both a plan administrator and as an insurer of the plan, standing alone, does not constitute a conflict of interest.[223] In determining if an administrator is operating under a conflict of interest, the court will look to the impact on the company's welfare of granting or denying the claim and whether it was sufficiently substantial to threaten an administrator's impartiality.[224] When a conflict of interest is found to exist, the court scrutinizes the loyalty of the fiduciary.[225]

Further, when the plan grants the administrator discretionary authority, its decision must comport to the plain meaning of the plan; otherwise, it is considered arbitrary and capricious.[226] However, it is not the function of the court under the arbitrary and capricious standard to determine whether it would have reached the same conclusion as the administrator, or whether it would have relied on the same authority.[227] The Seventh Circuit continues to strive for uniformity in ERISA actions,

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conflict of interest existed since the defendant acted both as the claims administrator and the insurer).

220. *See Mers*, 144 F.3d at 1020. The existence of a potential conflict is insufficient. *See id.*; *see also* Cuddington v. Northern Ind. Pub. Serv. Co. (NIPSCO), 33 F.3d 813, 816 (7th Cir. 1994) (holding the plaintiff must present specific evidence that the administrator had a conflict of interest when deciding the claim).

221. *See Chalmers*, 61 F.3d at 1344 (holding that if an administrator's financial interests were a judicial concern, ERISA would take measures to prohibit corporate officers from serving as plan administrators).

222. *See id.*

223. *See Mers*, 144 F.3d at 1020 (noting that the 7th Circuit has rejected the theory that an inherent conflict exists when the company-sponsored plan allows an insurance company to interpret its own policies); Cozzie v. Metropolitan Life Ins. Co., 140 F.3d 1104, 1108 (7th Cir. 1998) (finding the defendant did not have a conflict of interest even though it acted as administrator and insurer since the plaintiff did not establish that the defendant had a direct financial stake in the outcome of the plan interpretation); *see also Cuddington*, 33 F.3d at 816 (holding the fact that defendant's employees dominated a committee did not automatically constitute a conflict of interest).

224. *See Chalmers*, 61 F.3d at 1344.

225. *See* Hightshue v. AIG Life Ins. Co., 135 F.3d 1144, 1148 (7th Cir. 1998). In *Hightshue*, the court held that when it is possible to question a fiduciary's loyalty, the fiduciary is obligated to engage in an intensive independent investigation of its options to insure it is acting in the best interests of the plan beneficiaries: "Seeking independent expert advice is evidence of a thorough investigation, and provided that the fiduciary has investigated the expert's qualifications, has provided the expert with complete and accurate information, and determined that reliance on the expert's advice is reasonably justified under the circumstances, the fiduciary's decision will be respected, despite the conflict of interest." *Id.* (citing Howard v. Shay, 100 F.3d 1484, 1488 (9th Cir. 1996), *cert. denied*, 520 U.S. 1237 (1997)).

226. *See Cozzie*, 140 F.3d at 1108-09 (stating the administrator is bound by the terms of the plan document and its interpretation cannot contradict the plain language of the plan).

227. *See Mers*, 144 F.3d at 1021.

but the court only turns to common law when the plan is silent on an issue.[228]

Thus, the Seventh Circuit has adopted a traditional sliding scale analysis for conflict of interest situations.[229] The Seventh Circuit does not automatically infer a conflict of interest if the administrator receives a financial gain in denying a claim.[230] Instead, there is a presumption that a fiduciary is acting neutrally, and the plaintiff carries the burden of rebutting this presumption by establishing that the plan administrator had an actual bias or a significant conflict.[231] Accordingly, the Seventh Circuit appears to consider the big picture and be more objective in determining whether a plan administrator is operating under a conflict of interest.

d. Tenth Circuit

When a plan has granted an administrator discretionary authority in awarding benefits or interpreting the terms of the plan, the Tenth Circuit reviews the decision under an arbitrary and capricious standard, in accordance with the holding in *Firestone*.[232] A plan administrator will be held to have acted arbitrarily and capriciously if its decision was not supported by substantial evidence.[233] The decision by the administrator will not be disturbed under the arbitrary and capricious standard if it is a reasonable interpretation of the terms of the plan.[234]

The arbitrary and capricious standard is modified, however, if the administrator is acting under a conflict of interest.[235] If the plan admin-

228. *See id.* at 1022.

229. *See* Van Boxel v. Journal Co. Employees' Pension Trust, 836 F.2d 1048, 1052-53 (7th Cir. 1987).

230. *See Mers*, 144 F.3d at 1020.

231. *See id.*

232. *See* Chambers v. Family Health Plan Corp., 100 F.3d 818, 825 (10th Cir. 1996) (citing Firestone Tire and Rubber Co. v. Brunch, 489 U.S. 101, 115 (1989) (holding denial of ERISA benefits will be reviewed de novo unless the terms of the plan give the administrator discretionary authority to determine benefit eligibility or construe the terms of the plan)). In *Chambers*, the arbitrary and capricious standard was applicable since the plan expressly gave the administrator discretion to determine insurance benefits for experimental procedures. *See id.*; *see also* McGraw v. Prudential Ins. Co. of Am., 137 F.3d 1253, 1259 (10th Cir. 1998) (finding the arbitrary and capricious standard was appropriate since the plan expressly granted the administrator discretion to decide what was medically necessary).

233. *See* Sandoval v. Aetna Life and Cas. Ins. Co., 967 F.2d 377, 382 (10th Cir. 1992). The court in *Sandoval* defined substantial evidence as evidence that a reasonable mind could accept as adequate support for the conclusion reached by the administrator. *Id.* Substantial evidence requires "more than a scintilla but less than a preponderance." *Id.* (quoting Flint v. Sullivan, 951 F.2d 264, 266 (10th Cir. 1991)).

234. *See McGraw*, 137 F.3d at 1259 (citing Semtner v. Group Health Serv. of Okla., Inc., 129 F.3d 1390, 1393 (10th Cir. 1997)).

235. *See id.* at 1258 (citing *Firestone*, 489 U.S. at 115 (holding the fiduciary's conflict of interest is weighed as a factor in deciding if the fiduciary abused its discretion)).

istrator has a financial interest in the plan, a conflict of interest exists.[236] This, in turn, triggers a less deferential standard of review.[237] Therefore, the degree of deference in a conflict of interest situation will decrease on a sliding scale in proportion to the extent a conflict is present.[238] In applying the sliding scale analysis, the court must remain mindful that the arbitrary and capricious standard is inherently flexible.[239] The administrator must act in the sole interest of the participants of the plan in order to avoid a conflict of interest determination.[240] Accordingly, if the administrator does not act in the sole interest of the plan participants and is found to be operating under a conflict of interest, the arbitrary and capricious standard will be adjusted on a sliding scale in proportion to the degree of conflict that exists.[241]

As a general proposition, the reviewing court is only allowed to consider the evidence before the administrator at the time the decision was made.[242] While this premise still rings true, it appears to have been

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236. *See Chambers*, 100 F.3d at 825 (holding the administrator had a conflict of interest because every board member deciding the plaintiffs' claims had a financial interest in the company); *see also McGraw*, 137 F.3d at 1259 (finding a conflict of interest since every exercise of discretion by the administrator impacted the company financially, either filling or depleting its coffers); Buchanan v. Reliance Standard Life Ins. Co., 5 F. Supp. 2d 1172, 1180 (D. Kan. 1998) (finding a conflict of interest was present since every decision affected the defendant financially).

237. *See* Pitman v. Blue Cross and Blue Shield of Okla., 24 F.3d 118, 123 (10th Cir. 1994) (quoting Doe v. Group Hospitalization & Med. Serv., 3 F.3d 80, 86-87 (4th Cir. 1993) (holding that when a fiduciary has a conflict of interest, the deference given to the fiduciary will be lessened to the degree necessary to neutralize any influence resulting from the conflict)).

238. *See Chambers*, 100 F.3d at 826 (rejecting the presumptively void test and adopting the sliding scale approach when analyzing an administrator's decision in a conflict of interest situation). In *Chambers*, the court relied on the pre-*Firestone* decision in *Sage v. Automation, Inc. Pension Plan and Trust* to adopt the sliding scale analysis. *See Chambers*, 100 F.3d at 286-87 (citing Sage v. Automation, Inc. Pension Plan and Trust, 845 F.2d 885, 895 (10th Cir. 1988)); *see also Firestone*, 489 U.S. at 115. In *Sage*, the court utilized a modification of the arbitrary and capricious standard when analyzing a situation where the trustee's decision involved balancing of interests between current and future claimants. *Sage*, 845 F.2d at 895. In doing so, it adopted the analysis from the Seventh Circuit in *Van Boxel v. Journal Co. Employees' Pension Trust*, stating that the arbitrary and capricious standard is sufficiently flexible to allow the court to adjust for instances where the trustee is biased in favor of a third party or motivated by self interest. *See Sage*, 845 F.2d at 895 (citing Van Boxel v. Journal Co. Employees' Pension Trust, 836 F.2d 1048, 1049-53 (7th Cir. 1987)).

239. *See McGraw*, 137 F.3d at 1258.

240. *See id.* at 1263 (citing 29 U.S.C. § 1104(a)(1)(A) (1994)). The court also noted that there is no balancing of interest in an ERISA action as it commands undivided loyalty by the administrator to the plan participants. *See id.* (quoting Bedrick v. Travelers Ins. Co., 93 F.3d 149, 154 (4th Cir. 1996)).

241. *See Chambers*, 100 F.3d at 825 (stating that a conflict of interest triggers a less deferential standard of review).

242. *See id.* at 823 (citing Sandoval v. Aetna Life and Cas. Ins. Co., 967 F.2d 377, 380 (10th Cir. 1992) (stating the district court can normally consider only the evidence before the administrator when determining whether the administrator acted arbitrarily or capriciously)). In *Sandoval*, the court recognized the primary goal of ERISA was providing a method for beneficiaries to resolve disputes expeditiously and inexpensively, and it noted that allowing courts to consider evidence not presented to the plan administrator would greatly impair achievement of that goal. *Sandoval*, 967 F.2d at 380 (quoting Perry v. Simplicity Eng'g a Div. of Lukens Gen. Indus., Inc., 900 F.2d 963, 967 (6th Cir.

manipulated by the Tenth Circuit.[243] In *Buchanan v. Reliance Standard Life Insurance Company*,[244] the court recognized the general rule that the reviewing court cannot consider additional evidence that was not before the administrator at the time of its decision, but the court allowed the plaintiff to introduce additional evidence for review on procedural, rather than meritorious, grounds.[245]

The court concluded, therefore, that the plaintiff should not be precluded from submitting additional evidence in support of the narrow issue concerning the manner in which the administrator made its decision to assist the court in determining whether the administrator acted arbitrarily.[246] The court also allowed documents that were not part of the administrative record, but were mentioned in a letter in the record to be introduced, because they did not prejudice the defendant.[247] Thus, although limited, the courts in the Tenth Circuit appear to search for latitude in allowing additional evidence to be introduced for consideration by the reviewing court in deciding if the administrator acted arbitrarily or capriciously.[248] While there are differences in the specific factors the courts utilize in the traditional sliding scale test, the courts strongly adhere to the arbitrary and capricious standard regardless of the degree of conflict.[249]

2. *The Modified Sliding Scale Analysis*

For lack of a better description, this section is titled the "modified sliding scale analysis"; this describes the circuits that utilize the sliding scale analysis without actually terming it as such or that apply it in a non-traditional manner.[250] For example, in some cases, the issue has been presented to the court so recently that the application of the sliding scale analysis has not yet had an opportunity to develop fully.[251] Moreover, the modified sliding scale analysis has evolved in some courts

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1990)).

243. *See* Buchanan v. Reliance Standard Life Ins. Co., 5 F. Supp. 2d 1172, 1180-81 (D. Kan. 1998).

244. 5 F. Supp. 2d 1172 (D. Kan. 1998).

245. *See* Buchanan v. Reliance Standard Life Ins. Co., 5 F. Supp. 2d 1172, 1181 (D. Kan. 1998). The court allowed the plaintiff to introduce depositions not considered by the administrator in making its decision. *See id.* The court stated that the depositions could be considered only to the extent they shed light on the administrator's procedure in making its decision and not as they related to the substance of the claim or decision. *See id.*

246. *See id.* (citing *Chambers*, 100 F.3d at 824 (allowing the court to look beyond the administrative record in review of its interpretation but not to review the facts underlying the claim)).

247. *See id.*

248. *See id.* at 1180-81.

249. *See, e.g.*, Ellis v. Metropolitan Life Ins. Co., 126 F.3d 228, 233 (4th Cir. 1997) (stating that under no circumstances will the court deviate from the abuse of discretion standard when the plan language confers on the administrator discretionary authority).

250. *See, e.g.*, Abnathya v. Hoffmann-La Roche, Inc., 2 F.3d 40, 45 n.5 (3d Cir. 1993).

251. *See* Doyle v. Paul Revere Life Ins. Co., 144 F.3d 181, 184 (1st Cir. 1998).

through interpretation of decisions deriving from courts that utilize the presumptively void test.[252] The First, Third, and Sixth Circuits fall into these categories.

a. First Circuit

In *Doyle v. Paul Revere Life Insurance Co.*,[253] the First Circuit Court of Appeals adopted a hybrid or modification of the sliding scale analysis.[254] Following *Firestone,* the court must initially resolve whether the plan grants the administrator discretionary authority.[255] While the grant of discretionary authority must be clear, an explicit grant does not appear to be required.[256] In *Doyle,* the court determined that Paul Revere, the administrator, was granted discretion, which typically means its decision will not be disturbed unless it is arbitrary and capricious.[257] Thus, the decision will be upheld if it was within the administrator's authority, reasoned, and "supported by substantial evidence in the record."[258] In turn, substantial evidence is defined in the First Circuit as evidence reasonably sufficient to support a conclusion, regardless of whether contradictory evidence was introduced.[259]

In *Doyle*, the court stated that a deferential standard may not necessarily be warranted when a conflict of interest exists.[260] Additionally, the court acknowledged the advantage of adopting a simple procedure, such as an approach in which the decision of the administrator is given no deference, meaning the decision is reviewed under the de novo

252. *See* Morris v. Paul Revere Ins. Group, 986 F. Supp. 872, 881 (D.N.J. 1997) (looking to 11th Circuit case law in applying a heightened level of the arbitrary and capricious standard).

253. 144 F.3d 181 (1st Cir. 1998).

254. *See* Doyle v. Paul Revere Life Ins. Co., 144 F.3d 181, 184 (1st Cir. 1998).

255. *See* Firestone Tire and Rubber Co. v. Bruch, 489 U.S. 101, 115 (1989) (holding that if the plan gives the administrator discretionary authority, the standard is abuse of discretion, but if the plan does not give the administrator discretionary authority, the standard is de novo).

256. *See* Recupero v. New England Tel. and Tel. Co., 118 F.3d 820, 828 (1st Cir. 1997) (noting if an ERISA out-of-court decisionmaker is given some discretion, the reviewing court can only determine whether the decision was arbitrary and capricious); Diaz v. Seafarers Union, 13 F.3d 454, 456-58 (1st Cir. 1994) (holding the arbitrary and capricious standard was applicable when the plan granted broad discretionary authority to the trustee); Caola v. Delta Air Lines, Inc., 35 F. Supp. 2d 47, 50-51 (D. Mass. 1999) (applying the arbitrary and capricious standard when a clear discretionary grant was present in the language of the plan).

257. *See Doyle*, 144 F.3d at 183; *see also Recupero*, 118 F.3d at 837-38 (holding the plan administrator did not act arbitrarily or capriciously in denying disability benefits to an employee whose injury occurred on a coffee break, not during and in direct connection with the performance of the employee's duties, as required by the plan).

258. *See Doyle*, 144 F.3d at 184 (citing Associated Fisheries of Me., Inc. v. Daley, 127 F.3d 104, 109 (1st Cir. 1997)).

259. *See id.* (citing Sprague v. Director, Office of Workers' Compensation Programs, U.S. Dep't of Labor, 688 F.2d 862, 865-66 (1st Cir. 1982)).

260. *See id.*

standard.[261] While recognizing this advantage, the court rejected it, holding that when the administrator is conferred discretion and operates under a conflict of interest, the arbitrary and capricious standard will be interpreted with "more bite" and with a special emphasis on reasonableness.[262] However, the burden is on the plaintiff to establish that the decision was improperly motivated.[263]

In a recent decision, another panel of judges in the First Circuit, although recognizing *Doyle's* adoption of the arbitrary and capricious standard with "more bite," evaluated the administrator's decision based on a "reasonable" requirement.[264] The court in *Doe v. Travelers Insurance Company*[265] justified this approach by indicating that the essential requirement of reasonableness had substantial bite itself, at least when the court was concerned with a specific treatment decision based on medical criteria rather than a broad public policy issue.[266] The court further reasoned that any reviewing court would be aware that payment of claims cost the insurance company money and the company's general interest in conserving its resources was not the type of conflict that warranted de novo review.[267]

While the First Circuit has not listed any factors or guidelines to assist it in determining whether an administrator is operating under a conflict of interest or improper motive, there is an indication that it utilizes a weighing analysis.[268] In *Doe*, the court followed the analysis in *Doyle*, stating that the mere fact that there would be a cost to the decision-

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261. *See id.* (citing Armstrong v. Aetna Life Ins. Co., 128 F.3d 1263, 1265 (8th Cir. 1997)). In *Armstrong*, the court reviewed the decision of Aetna de novo because Aetna acted in the dual capacity as plan administrator and insurer which created a continuing conflict of interest. *Armstrong*, 128 F.3d at 1265. The court was informed by the reasoning of the Eleventh Circuit holding that a relationship placing an ERISA plan administrator in "perpetual conflict" warranted a higher level of scrutiny. *See id.* (citing Brown v. Blue Cross and Blue Shield of Ala., Inc., 898 F.2d 1556, 1561 (11th Cir. 1990), *cert. denied*, 498 U.S. 1040 (1991)).

262. *See id.* (quoting Doe v. Travelers Ins. Co., 971 F. Supp. 623, 630 (D. Mass. 1997) (stating that in case of a conflict the court will "giv[e] 'more bite' to the arbitrary and capricious standard"), *aff'd in part and rev'd in part*, 167 F.3d 53 (1st Cir. 1999)). The reasonableness factor evolved from the sliding scale analysis in *Van Boxel v. Journal Co. Employees' Pension Trust*, where the court stated that the judiciary must carefully scrutinize the administrator's decision to make sure it was reasonable. *See Doyle*, 144 F.3d at 184 (citing Van Boxel v. Journal Co. Employees' Pension Trust, 836 F.2d 1048, 1053 (7th Cir. 1987)). Moreover, the court stated that not to require the plaintiff to prove the improper motive faction would sacrifice the advantages of the arrangement. *See id.*

263. *See id.*

264. *See Doe*, 167 F.3d at 57 (stating Travelers' decision should be reviewed under a reasonable standard, which is the basic touchstone of those types of cases and fine gradations in phrasing are likely to complicate the standard); *Doyle*, 144 F.3d at 184.

265. *See Doe*, 167 F.3d at 57.

266. *See id.*

267. *See id.*

268. *See Doyle*, 144 F.3d at 184. The court determined the facts that Paul Revere was a subsidiary of Textron—plaintiff's employer—and that Paul Revere determined what claims it would pay were not sufficient to establish an improper motive. *See id.*

maker if an individual claim was paid was insufficient to show the decision was improperly motivated.[269] Accordingly, there is an implication that the First Circuit may utilize the de novo standard when the administrator's conflict of interest satisfies some imaginary threshold yet to be determined.[270]

The *Doe* court resolved the question concerning what "record" should be evaluated by the court in judging the reasonableness of the insurance company's decision.[271] The First Circuit had previously avoided determination of this question despite recognizing it as unanswered.[272] In *Doe*, the court stated that there is not one clear answer to cover all the variations in ERISA cases.[273] The court determined, however, that the record in that instance was information the insurance company had in its possession at the time of its original decision.[274]

Hence, although not necessarily termed a sliding scale analysis, the arbitrary and capricious analysis with "bite" adopted by the First Circuit for conflict of interest situations resembles the sliding scale test more than any other. The "bite" facet of the analysis seems to imply that a finding of a conflict will lessen the deference given to the administrator's denial of plan benefits, and possibly diminish the arbitrary and capricious standard of review to the point of a de novo standard.[275] Nonetheless, due to the recency and the internal conflict between the decisions, the true application of the modified arbitrary and capricious standard in the First Circuit remains to be seen.

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269. *See Doe*, 167 F.3d at 57; *Doyle*, 144 F.3d at 184.

270. *See Doe*, 167 F.3d at 57. The court acknowledged that the Supreme Court's decision in *Firestone Tire and Rubber Co. v. Bruch* stated that in situations where a plan fiduciary is exercising discretion, but is found to be acting under a conflict of interest, the conflict must be a factor in determining whether discretion was abused. *See Doe*, 167 F.3d at 57 (citing Firestone Tire and Rubber Co. v. Bruch, 489 U.S. 101, 115 (1989)). In addition, the court noted that the Supreme Court failed to explain what constitutes a conflict and how the factor is to be weighed, creating divided opinions throughout the courts. *See id.*

271. *See id.*

272. *See* Recupero v. New England Tel. and Tel. Co., 118 F.3d 820, 833 (1st Cir. 1997) (noting that the question whether a court reviewing benefit determinations is restricted to the record considered by the decisionmaker who interpreted the plan was undecided and declining to consider the question).

273. *See Doe*, 167 F.3d at 57. The court stated that the record may depend upon what was decided, by whom, based on what type of information, the standard of review, and the relief sought. *See id.*

274. *See id.*

275. *See id.* (stating that the insurance company's general interest in conserving its resources was not the kind of conflict that warranted de novo review); Doyle v. Paul Revere Life Ins. Group, 144 F.3d 181, 184 (1st Cir. 1998) (holding that in cases involving a conflict of interest, the arbitrary and capricious standard is applied with "more bite").

b. Third Circuit

While it has not yet specifically ruled, the Third Circuit appears to interpret the Supreme Court's *Firestone* decision as a directive to incorporate a weighing process when analyzing a conflict of interest situation.[276] The Third Circuit, however, relies on case law from the Eleventh Circuit, which utilizes the presumptively void test, for support in applying a heightened level of the arbitrary and capricious standard.[277] Thus, the test adopted in the Third Circuit for conflict of interest situation is a modified arbitrary and capricious analysis.

Through interpretation of Eleventh Circuit case law, a two-part test has evolved for cases in which a plan administrator is motivated by self-interest.[278] First, the court must review the administrator's decision under the de novo standard to determine if it is a legally correct interpretation of the relevant plan provisions.[279] Second, the court may inquire if the decision was tainted by self-interest, even if it was reasonable.[280] The burden of establishing that a conflict of interest exists is on the person who alleges that the administrator's exercise of discretion was tainted by self-interest.[281] Decisions tainted by self-interest are deemed, in the Third Circuit, to be arbitrary and capricious.[282]

Further, when a party acts in a dual capacity as plan administrator and as insurer, a "hobgoblin of self-interest" is created.[283] A "hobgob-

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276. *See* Mitchell v. Eastman Kodak Co., 113 F.3d 433, 437 n.4 (3d Cir. 1997) (stating that a conflict of interest warrants a heightened review of the administrator's decision). In *Rizzo v. Paul Revere Ins. Group*, the court stated that while the Third Circuit has yet to decide a case involving an insurance company that has been afforded discretion and is acting under a conflict of interest, it has also not disapproved of the 11th Circuit's presumptively void approach. Rizzo v. Paul Revere Ins. Group, 925 F. Supp. 302, 309 (D.N.J. 1996), *aff'd*, 111 F.3d 127 (3d Cir. 1997).

277. *See* Morris v. Paul Revere Ins. Group, 986 F. Supp. 872, 881 (D.N.J. 1997). In *Morris*, the court stated that the application of the arbitrary and capricious standard "ranges from slight to great, depending upon the dynamics of the decisionmaking process." *Id.* (quoting Brown v. Blue Cross and Blue Shield of Ala., Inc., 898 F.2d 1556, 1564 (11th Cir. 1990), *cert. denied*, 498 U.S. 1040 (1991)). The court may apply a heightened level of scrutiny to an administrator's decision if the decision is affected by a conflict of interest. *See id.*

278. *See Rizzo*, 925 F. Supp. at 309 (quoting *Brown*, 898 F.2d at 1566 n.12, 1567).

279. *See id.* at 309-10.

280. *See id.*

281. *See* Kotrosits v. GATX Corp. Non-Contributory Pension Plan for Salaried Employees, 970 F.2d 1165, 1173 (3d Cir.), *cert. denied*, 506 U.S. 1021 (1992).

282. *See* Morris, 986 F. Supp. at 882 (citing *Rizzo*, 925 F. Supp. at 310). In *Morris*, the court determined that Paul Revere's dual role as both claims administrator and issuing insurance company created a "hobgoblin of self-interest." *Id.*

283. *See id.* (finding a conflict of interest that necessitated a stricter application of the arbitrary and capricious standard since the defendant acted both as the plan administrator and the insurer); *Rizzo*, 925 F. Supp. at 309 (quoting *Brown*, 898 F.2d at 1568); Nolen v. Paul Revere Life Ins. Co., 32 F. Supp. 2d 211, 216 (E.D. Pa. 1998) (holding an inherent conflict of interest exists when an insurance company acts both as the insurer and claims administrator because when the claims administrator pays a claim, the insurer incurs a direct expense). *Compare* Mitchell v. Eastman Kodak Co., 113 F.3d 433,

lin of self-interest" is an inherent implication of self-interest, thereby establishing a conflict of interest.[284] However, in order to warrant application of a more stringent arbitrary and capricious standard, the record must reflect a genuine conflict of interest.[285] If the court finds a conflict of interest, it will undertake an independent evaluation of the significance of the alleged bias to determine the appropriate level of deference applicable to the administrator's decision.[286]

Determining the appropriate standard of review is dependent upon the terms of the plan and whether it affords the administrator discretion in making decisions.[287] The grant of discretion to the plan administrator may be either express or implied in the plan.[288] However, when deciding if the terms of the plan confer discretionary authority on the administrator, the plan provisions should be interpreted in light of all the circumstances.[289]

If the court determines that the plan grants the administrator discretionary authority, it must operate from the premise that the review of the administrator's decision is guided by the arbitrary and capricious standard.[290] Under the arbitrary and capricious standard, the administrator's decision can be overturned only if it is "without reason, unsupported by substantial evidence or erroneous as a matter of law."[291] In addition, the

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437 n.4 (3d Cir. 1997) (determining there was no conflict of interest because defendant incurred no direct expense resulting from the allowance or denial of benefits); *with* Abnathya v. Hoffmann-La Roche, Inc., 2 F.3d 40, 45 n.5 (3d Cir. 1993) (stating that although some degree of conflict inevitably exists when a party acts both as the plan administrator and the employer, there was no conflict because the defendant did not incur a direct expense in allowing or denying claim benefits); *and Kotrosits*, 970 F.2d at 1173 (finding no conflict of interest because the administrator suffered no direct impact and only a possible future indirect impact).

284. *See Brown*, 898 F.2d at 1568.

285. *See Rizzo*, 925 F. Supp. at 308.

286. *See Kotrosis*, 970 F.2d at 1172 n.5.

287. *See Abnathya*, 2 F.3d at 44-45 (citing Firestone Tire and Rubber Co. v. Bruch, 489 U.S. 101, 115 (1989) (holding denials of benefits under ERISA are reviewed de novo unless the plan grants the administrator discretion to determine eligibility of benefits, in which case the arbitrary and capricious standard is appropriate)); *see also* Heasley v. Belden & Blake Corp., 2 F.3d 1249, 1254 (3d Cir. 1993) (stating selection of the appropriate standard of judicial review is determined by the terms of the plan).

288. *See* Luby v. Teamsters Health, Welfare, and Pension Trust Funds, 944 F.2d 1176, 1180 (3d Cir. 1991). In *Luby*, the court held that a general grant of discretionary power did not imply authority to decide specific disputes between beneficiary claimants. *See id.* However, if discretion is expressly granted in a specific area of the plan, that does not mean that the administrator has implied discretion in a different area of the plan. *See id.* The court reasoned that if the drafters had intended to grant discretion in another area, they would have done so expressly. *See id.* at 1181.

289. *See Heasley*, 2 F.3d at 1256. The court determined that where the terms of the plan concerning discretion are ambiguous, it will apply the rule of *contra proferentum*. *See id.* at 1257. This concept states that if the contract is susceptible to two or more meanings after applying normal contract construction principles, the interpretation most favorable to the insured will be adopted. *See id.* The court held that adoption of this principle is appropriate under ERISA because it promotes the purpose of ERISA: to protect the contractually defined interests of employees and beneficiaries. *See id.*

290. *See Rizzo*, 925 F. Supp. at 308 (citing *Abnathya*, 2 F.3d at 45).

291. *See Abnathya*, 2 F.3d at 45 (quoting Adamo v. Anchor Hocking Corp., 720 F. Supp. 491, 500 (W.D. Pa. 1989). In *Abnathya*, the court further noted that under the arbitrary and capricious

scope of the arbitrary and capricious standard is narrow, and the court is not free to substitute its own judgment for the administrator's.[292] Importantly, under the arbitrary and capricious standard, the court is limited to the same record available to the administrator at the time of its decision.[293] If, however, the plan does not grant discretionary authority to the administrator, the standard is de novo, and the court is entitled to supplement the record on review.[294]

Therefore, if the plan does not give the plan administrator discretion, the applicable standard of review is de novo.[295] However, if discretion is granted, the arbitrary and capricious standard of review is used.[296] Finally, if the administrator is granted discretionary authority but is operating under a conflict of interest, the applicable standard is a heightened arbitrary and capricious standard of review.[297] Thus, despite adopting a test through analogy of Eleventh Circuit case law, the Third Circuit appears to lean toward the sliding scale analysis in conflict of interest situations.[298]

c. Sixth Circuit

Similar to the First Circuit, the Sixth Circuit Court of Appeals has indirectly adopted the sliding scale analysis for conflict of interest scenarios, despite never distinctly terming it as such.[299] In determining the appropriate standard of review in a conflict of interest scenario, the reviewing court must first examine the plan and decide whether it grants the administrator sufficient discretion to determine eligibility for benefits

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standard, the court must defer to the administrator's decision unless it is clear that it is not supported by evidence in the record or if the administrator has not complied with the plan procedures. *See id.* at 48.

292. *See id.* at 45 (quoting Lucash v. Strick Corp., 602 F. Supp. 430, 434 (E.D. Pa. 1984)).

293. *See* Morris v. Paul Revere Ins. Group, 986 F. Supp. 872, 882 (D.N.J. 1997) (citing Stout v. Bethlehem Steel Corp., 957 F. Supp. 673, 691 (E.D. Pa. 1997) (holding that when reviewing a denial of benefits under the arbitrary and capricious standard the court is behooved to consider only the evidence available to the administrator at the time of its decision)).

294. *See* Luby v. Teamsters Health, Welfare, and Pension Trust Funds, 944 F.2d 1176, 1185-87 (3d Cir. 1991). The court in *Luby* held that not allowing additional evidence when the plan administrator's decision is reviewed de novo made little sense and is contrary to the concept of de novo review. *See id.* at 1184. The court is not, however, required to conduct a de novo evidentiary hearing, because if the record is sufficiently developed the court can simply make its own de novo benefit determination. *See id.* at 1185.

295. *See Morris*, 986 F. Supp. at 881 (citing Firestone Tire and Rubber Co. v. Bruch, 489 U.S. 101, 115 (1989)).

296. *See id.*

297. *See id.*

298. *See id.* at 882 (holding a stricter application of the arbitrary and capricious standard is applicable where the administrator is acting under a conflict of interest).

299. *See* Peruzzi v. Summa Med. Plan, 137 F.3d 431, 433 (6th Cir. 1998). In *Peruzzi*, the court recognized that a conflict of interest does not alter the standard of review, but it rather should be taken into account as a factor in determining if the decision was arbitrary and capricious. *See id.* (citing Davis v. Kentucky Fin. Cos. Retirement Plan, 887 F.2d 689, 694 (6th Cir. 1989), *cert. denied*, 499 U.S. 905 (1990)).

or construe the terms of the plan.[300] In order to trigger the arbitrary and capricious standard, the language granting discretionary authority in the plan must be clear.[301] Further, the Sixth Circuit has indicated that "discretion is not an all-or-nothing proposition."[302] While the exact word "discretion" is unnecessary, each plan must be read in its entirety, and the language relied on to create the degree of discretion is reviewed in context.[303] Upon establishing a degree of discretion under the plan, the reviewing court must then determine "the exact contours of the discretionary authority."[304]

A plan administrator's decision concerning eligibility for benefits is not arbitrary and capricious if it is "rational in light of the plan's pro-

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300. *See* Wulf v. Quantum Chem. Corp., 26 F.3d 1368, 1373 (6th Cir. 1994), *cert. denied*, 513 U.S. 1058 (1994). In developing this initial step in the analysis, the court relied on language in *Firestone Tire and Rubber Co. v. Bruch* stating that a denial of benefits by a plan administrator should be reviewed de novo unless the language of the plan grants the administrator or fiduciary discretionary authority to determine benefit eligibility. *See Wulf*, 26 F.3d at 1372-73 (citing Firestone Tire and Rubber Co. v. Bruch, 489 U.S. 101, 109 (1989)); *see also* Miller v. Metropolitan Life Ins. Co., 925 F.2d 979, 983 (6th Cir. 1991) (holding application of the highly deferential arbitrary and capricious standard is applicable only when the plan grants the administrator or fiduciary discretionary authority to determine benefit eligibility).

301. *See Wulf*, 26 F.3d at 1373 (citing Anderson v. Great West Life Assurance Co., 942 F.2d 392, 395 (6th Cir. 1991), *on remand*, 777 F. Supp. 1374 (E.D. Mich. 1991)).

302. *Id.* In *Anderson*, the court recognized that a plan can give an administrator discretion to make some decisions, but not others. *Anderson*, 942 F.2d at 395. Therefore, a plan administrator has "exactly the amount and type of discretion granted by the plan, no more, and no less." *Id.* On remand, the federal district court agreed with the Sixth Circuit's holding and determined both that the only right conferred on the administrator under the plan was the amount of benefits and that no provision granted the administrator discretionary authority to determine eligibility or construe the terms of the plan. *See* Anderson v. Great West Life Assurance Co., 777 F. Supp. 1374, 1376 (E.D. Mich. 1991); *see also Wulf*, 26 F.3d at 1374 (finding the language granted nothing more than authority to make rules for administration of the plan). In *Wulf*, the court relied on *Kirwan v. Marriott Corp.*, where the language "authority to control and manage the operation and administration of the [p]lan" and authority to "promulgate such rules and regulations as deemed necessary and proper to interpret the [p]lan" was held to grant administrative powers and thus were insufficient to trigger the arbitrary and capricious standard of review. *Wulf*, 26 F.3d at 1374 (citing Kirwan v. Marriott Corp., 10 F.3d 784, 788 (11th Cir. 1994)).

303. *See Wulf*, 26 F.3d at 1373; *see also Miller*, 925 F.2d at 983-84. The court in *Miller* relied on a similar definition of "disabled," interpreted in *Bali v. Blue Cross and Blue Shield Ass'n*, to find a granting of discretion. *Miller*, 925 F.2d at 983-84 (relying on Bali v. Blue Cross and Blue Shield Ass'n, 873 F.2d 1043, 1047 (7th Cir. 1989)). The relevant language in the plan influencing the court indicated that disability was determined "on the basis of medical evidence satisfactory to the insurer." *Id.* The court in *Bali* held that while the provision did not grant complete discretion to the insurer in ultimately determining disability, it did grant discretion in deciding what evidence may be required from an applicant to provide a basis for making a disability determination. *Bali*, 873 F.2d at 1047. However, the administrator's requests for additional information must be reasonable in order to be within its discretion. *See id.* Similarly, under the plan in *Miller*, Metropolitan was granted discretion to make reasonable requests for documentation and to determine what evidence may be required to establish a basis for a disability determination. *Miller*, 925 F.2d at 984. Accordingly, the appropriate standard of review was arbitrary and capricious. *See id.*

304. *Anderson*, 942 F.2d at 395 (finding the plan administrator's authority is limited to that granted in the plan). On remand, this premise was sustained. *See Anderson*, 777 F. Supp. at 1376.

visions"[305] or is the result of a "deliberate principled reasoning process supported by substantial evidence."[306] Further, when it is possible to offer a reasoned explanation for a specific outcome, based on the evidence, that outcome is not arbitrary and capricious.[307] In the Sixth Circuit, arbitrary and capricious is equated with "unreasonable."[308] Accordingly, while a conflict of interest does not alter the standard of review, it should be taken into consideration as a factor in determining whether the administrator's decision was arbitrary and capricious.[309]

Importantly, an administrator who both funds and administers the plan is determined to be acting under an actual and readily apparent conflict of interest, rather than a potential conflict, if it receives a direct financial benefit from denial or discontinuation of benefits.[310] The question then becomes whether the administrator was improperly influenced by its conflict.[311] In reviewing the denial of benefits under ERISA, the court must strictly adhere to the general proposition that review is limited to the information actually considered by the administrator at the time it made its final decision.[312] This limitation, however, has been expanded to include information considered and received by the administrator during the administrative appeals process.[313] Further, the Sixth Circuit has

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305. *Miller*, 925 F.2d at 984 (citing Daniel v. Eaton Corp., 839 F.2d 263, 267 (6th Cir), *cert. denied*, 488 U.S. 826 (1988)); *see also* Perry v. United Food and Commercial Workers Dist. Unions 405 and 442, 64 F.3d 238, 241 (6th Cir. 1995) (stating on outcome is not arbitrary or capricious when it is possible to offer a reasoned explanation based on the evidence).

306. Killian v. Healthsource Provident Adm'r, Inc., 152 F.3d 514, 520 (6th Cir. 1998) (citing Baker v. United Mine Workers of Am. Health and Retirement Funds, 929 F.2d 1140, 1144 (6th Cir. 1991)).

307. *See Perry*, 64 F.3d at 241 (citations omitted).

308. *See* Peruzzi v. Summa Med. Plan, 137 F.3d 431, 433 (6th Cir. 1998) (citing Wendy's Int'l, Inc. v. Karsko, 94 F.3d 1010, 1012 (6th Cir. 1996)). The proper inquiry focuses on determination of the reasonableness of the plan administrator's decision rather than the reasonableness of the denied treatment. *See id.* at 435.

309. *See id.* at 433 (citing Davis v. Kentucky Fin. Cos. Retirement Plan, 887 F.2d 689, 694 (6th Cir. 1989), *cert. denied*, 499 U.S. 905 (1990)).

310. *See Killian*, 152 F.3d at 521., The defendant in *Killian Healthsource* both funded and administered the plan. *See id.* Accordingly, the court found that Healthsource acted arbitrarily and capriciously when it refused to consider additional information submitted by the plaintiff, and it held that refusal made no sense in the absence of an improper financial motive. *See id.* at 522. Therefore, Healthsource's actions were shaped by its conflict of interest. *See id.*

311. *See id.* at 521 (rejecting Healthsource's assertion that both funding and administering the plan only gives rise to a potential conflict of interest).

312. *See* Perry v. Simplicity Eng'g a Div. of Lukens Gen. Indus., Inc., 900 F.2d 963, 966 (6th Cir. 1990); *see also Killian*, 152 F.3d at 522 (holding the district court erred in conducting its own review of material not available to the administrator at the time of its decision); Miller v. Metropolitan Life Ins. Co., 925 F.2d 979, 986 (6th Cir. 1991) (finding the court may only consider evidence available to the administrator at the time the final decision was made).

313. *See id.*

applied this limitation to both an arbitrary and capricious standard,[314] as well as the de novo standard of review.[315]

Therefore, in the Sixth Circuit, the plan must clearly grant the administrator discretionary authority to determine benefit eligibility or construe the terms of the plan in order to trigger the arbitrary and capricious standard of review.[316] Significantly, if a single entity both funds and administers the plan, thereby incurring a direct expense when allowing claims and directly benefiting from denying of claims, an actual conflict of interest exists.[317] Finally, the Sixth Circuit, while continuing to adhere to the general rule, has included within the scope of the record available to the reviewing court any information before the administrator during the entire administrative process, including the appeals process.[318]

In conclusion, although the circuits applying the sliding scale analysis share the same test, its actual application differs significantly.[319] For example, some circuits find that an inherent conflict of interest exists if the plan administrator has any financial incentive in the denial of benefits, whereas other circuits balance the degree of financial gain in the denial of a claim with the overall assets of the corporation.[320] In addition, individual factors have been developed by the circuits to assist in applying the sliding scale analysis.[321] As a result, application of the sliding scale analysis is not uniform throughout the circuits that have either directly or indirectly adopted it in a traditional or modified capacity.

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314. *See* Crews v. Central States, Southeast and Southwest Areas Pension Fund, 788 F.2d 332, 336 (6th Cir. 1986).

315. *See Perry*, 900 F.2d at 966 (applying the de novo standard of review).

316. *See* Wulf v. Quantum Chem. Corp., 26 F.3d 1368, 1373 (6th Cir.), *cert. denied*, 513 U.S. 1058 (1994).

317. *See Killian*, 152 F.3d at 521.

318. *See Miller*, 925 F.2d at 984.

319. *Compare*, Wildbur v. ARCO Chem. Co., 974 F.2d 631, 639 (5th Cir. 1992) (allowing the reviewing court to review information outside the administrative record in deciding whether the plan administrator's decision was arbitrary and capricious), *with Miller*, 925 F.2d at 986 (indicating the record includes all information before the administrator at the time of its final decision, including the administrative appeals process).

320. *Compare* Mers v. Marriott Int'l Group Accidental Death and Dismemberment Plan, 144 F.3d 1014, 1020 (7th Cir.) (finding no inherent conflict of interest existed because the plaintiff's claim would cost the company $200,000 and the company was one of the 50 largest companies in the "Fortune 500" listing), *cert. denied*, 119 S. Ct. 372 (1998), *with Killian*, 152 F.3d at 521 (holding an actual and readily apparent conflict of interest exists where an administrator both funds and administers the plan).

321. *Compare*, Haley v. Paul Revere Life Ins. Co., 77 F.3d 84, 89 (4th Cir. 1996) (adopting a modified version of the Restatement factors in determining if a plan administrator abused its discretion), *with* Jordan v. Cameron Iron Works, Inc., 900 F.2d 53, 56 (5th Cir.), *cert. denied*, 498 U.S. 939 (1990) (creating a multi-part analysis through circuit case law applying the abuse of discretion standard).

C. THE PRESUMPTIVELY VOID TEST

The presumptively void test is a minority approach to the conflict of interest analysis.[322] This test is derived from the common law of trusts, by which any action taken by a trustee in violation of its fiduciary obligation is presumptively void.[323] The significant difference between the presumptively void standard and the arbitrary and capricious standard is that, under the presumptively void analysis, once the claimant has demonstrated that the plan administrator is operating under a substantial conflict of interest, the burden shifts to the plan administrator to prove that its interpretation of the plan was not tainted by self-interest.[324] The burden-shifting component of the presumptively void test is based on the premise that a failure to shift the burden would leave beneficiaries unprotected.[325]

1. *Eleventh Circuit*

The presumptively void test originated in the Eleventh Circuit.[326] The Eleventh Circuit recognizes three distinct standards of review in ERISA claims: 1) de novo, applied when the plan does not grant the administrator discretion, 2) arbitrary and capricious, used when the plan grants discretionary authority to the administrator, and 3) heightened arbitrary and capricious, employed if the plan administrator has a conflict of interest.[327] As in all circuits, the threshold question, whether the plan grants the administrator discretionary authority, must be answered to determine which of the above standards of review is appropriate.[328] To invoke the arbitrary and capricious standard, the plan must contain express unambiguous language giving the administrator dis-

322. *See, e.g.*, Lang v. Long-Term Disability Plan of Sponsor Applied Remote Tech., Inc., 125 F.3d 794, 798-99 (9th Cir. 1997).

323. *See* GEORGE GLEASON BOGERT & GEORGE TAYLOR BOGERT, THE LAW OF TRUSTS AND TRUSTEES § 95, at 341-42 (West rev. 6th ed. 1986). For example, the plan administrator has a fiduciary obligation to act in the sole interest of the plan participants and beneficiaries. *See* 29 U.S.C. § 1103 (1994). If the plan administrator's actions are motivated to serve an interest other than the benefit of the plan participants, the actions are deemed presumptively void. *See* Brown v. Blue Cross and Blue Shield of Ala., Inc., 898 F.2d 1556, 1565 (11th Cir. 1990), *cert. denied*, 498 U.S. 1040 (1991).

324. *See* Stvartak v. Eastman Kodak Co., 945 F. Supp. 1532, 1353 (M.D. Fla. 1996), *aff'd*, 144 F.3d 54 (11th Cir. 1998).

325. *See Brown*, 898 F.2d at 1565.

326. *See id.*

327. *See* Buckley v. Metropolitan Life, 115 F.3d 936, 939 (11th Cir. 1997), *reh'g denied*, 129 F.3d 617 (11th Cir. 1997) (citing Marecek v. BellSouth Telecomm., Inc., 49 F.3d 702, 705 (11th Cir. 1995)).

328. *See* Godfrey v. BellSouth Telecomm., Inc., 89 F.3d 755, 757 (11th Cir. 1996).

cretionary authority to determine eligibility for benefits or construe the terms of the plan.[329]

A very methodical process has been developed in the Eleventh Circuit for analyzing an ERISA denial of benefits in which the plan administrator has discretionary authority and is operating under a conflict of interest.[330] The first step in the application of the arbitrary and capricious standard is determining whether the administrator's interpretation of the provision was legally correct.[331] If the administrator's decision is legally incorrect, the court then must evaluate the self-interest of the administrator.[332] The plan beneficiary must demonstrate a substantial conflict of interest on the part of the administrator responsible for benefit determination.[333] The burden then shifts to the fiduciary to prove that its discretionary interpretation of the plan was not tainted by self-interest.[334] Thus, even though the administrator's interpretation is reasonable, it is deemed arbitrary and capricious if it advances the conflicting interests of the administrator at the expense of plan beneficiaries.[335] However, this finding can be rebutted if the administrator can justify its interpretation on the grounds that it will benefit the class of all plan participants and beneficiaries.[336]

Next, the court must evaluate whether the administrator acted arbitrarily and capriciously in its interpretation of the plan.[337] The Eleventh Circuit determines whether the administrator's interpretation was "wrong" by utilizing the de novo standard of review.[338] An ad-

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329. *See Stvartak*, 945 F. Supp. at 1535 n.1 (citing Kirwan v. Marriott Corp., 10 F.3d 784, 785, 789 (11th Cir. 1994)).

330. *See Brown*, 898 F.2d at 1566-67.

331. *See Stvartak*, 945 F. Supp. at 1535 (noting that the court must decide if the administrator has proposed a sound interpretation of the plan when determining whether the interpretation is legally correct).

332. *See id.*

333. *See Brown*, 898 F.2d at 1566.

334. *See id.* The court stated that judicial hesitation inquiring into the fiduciary's motives will leave beneficiaries unprotected unless the existence of a substantial conflicting interest shifts the burden to the fiduciary to demonstrate its decision is not infected with self-interest. *See id.* at 1565. The reasons provided by the administrator to prove it was not tainted by self-interest need not be compelling, only sufficient to take them out of the arbitrary mold. *See id.* at 1567 (quoting Fine v. Semet, 699 F.2d 1091, 1095 (11th Cir. 1983)).

335. *See id.* at 1566-67.

336. *See id.*

337. *See id.* at 1559 (stating that the court must determine if the administrator acted arbitrarily and capriciously by determining whether there was a reasonable basis for its decision based on the facts known to the administrator at the time the decision was made) (citing Jett v. Blue Cross and Blue Shield of Ala., Inc. 890 F.2d 1137, 1139 (11th Cir. 1989)).

338. *See id.* at 1566 n.12.

ministrator's interpretation of the plan is wrong if it is motivated by self-interest.[339]

Significantly, actions by the plan administrator that are tainted by self-interest are considered to be conflicting interests to that of the plan participants and may be deemed an inherent conflict.[340] An inherent conflict of interest exists when the source of the funding of the plan also serves as the administrator in determining eligibility for benefits that are paid from the funding source's assets.[341] This conflict of interest analysis was derived from a review of the trust principle of "improper motive" by a trustee.[342]

In determining whether the administrator's decision was arbitrary and capricious, the court is limited to deciding if the plan interpretation was made rationally and in good faith, not if it was correct.[343] The concept of "reasonable basis" must be modified in the application of the arbitrary and capricious standard when the administrator is operating under a conflict of interest.[344] Further, the arbitrary and capricious standard must be "contextually tailored."[345] The court is limited to

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339. *See* Stvartak v. Eastman Kodak Co., 945 F. Supp. 1532, 1535 (M.D. Fla. 1996), *aff'd*, 144 F.3d 54 (11th Cir. 1998).

340. *See Brown*, 898 F.2d at 1565.

341. *See id.* at 1561 (holding that since the insurance company paid beneficiaries from the assets of its trust, its fiduciary role was in perpetual conflict with its profit-making role as a business); *see also* Vann v. National Rural Elec. Co-op Ass'n Retirement and Sec. Program, 978 F. Supp. 1025, 1035 (M.D. Ala. 1997) (stating an inherent conflict of interest exists when the administrator incurs a direct, immediate expense from a benefits determination). In addition, the Eleventh Circuit also does not distinguish, in an ERISA analysis, between a fiduciary and a plan administrator. *See Brown*, 898 F.2d at 1560.

342. *See id.* at 1565 (quoting RESTATEMENT (SECOND) OF TRUSTS § 187 cmt. g (1959)) (noting that courts must consider the fact that the trustee has an interest which conflicts with the beneficiary). The court further noted that an administrator may consciously or unconsciously favor its interests over those of the plan fiduciaries. *See id.* (citing Fulton Nat'l Bank v. Tate, 363 F.2d 562, 571 (5th Cir. 1966)).

343. *See Vann*, 978 F. Supp. at 1038 (citing Cagle v. Bruner, 112 F.3d 1510, 1517 (11th Cir. 1997), *reh'g denied*, 124 F.3d 223 (11th Cir. 1997)). The court utilized factors to assist in applying the arbitrary and capricious standard: "1) the uniformity of the administrator's construction; 2) the reasonableness of its interpretation; 3) possible concerns with the way unexpected costs may affect the future financial health of the plan." *Id.* (citing *Cagle*, 112 F.3d at 1517). Additional factors for evidence of good faith include: "1) the internal consistency of the plan under the interpretation given by the administrators; 2) any relevant regulations formulated by the appropriate administrative agencies; 3) the factual background of the determination by the plan administrator and inferences of lack of good faith, if any." *Id.* (citing Blank v. Bethlehem Steel Corp., 926 F.2d 1090, 1093 (11th Cir.), *cert. denied*, 502 U.S. 938 (1991)).

344. *See Brown*, 898 F.2d at 1559. The court looked to the Restatement factors for assistance in measuring the arbitrary and capricious standard:

> 1) the extent of the discretion conferred upon the trustee by the terms of the trust; 2) the purposes of the trust; 3) the nature of the power; 4) the existence or non-existence, the definiteness or indefiniteness, of an external standard by which the reasonableness of the trustee's conduct can be judged; 5) the motives of the trustee in exercising the power; 6) the existence of an interest in the trustee conflicting with that of the beneficiaries.

Id. at 1564-65 (quoting RESTATEMENT (SECOND) OF TRUSTS § 187 cmt. d).

345. *See id.* at 1564.

review of the facts available to the administrator at the time the decision to deny benefits was made.[346] However, application of the arbitrary and capricious standard is shaped by the circumstances of an inherent conflict of interest.[347] The Eleventh Circuit recognizes the arbitrary and capricious standard as a range rather than a fixed point.[348] Finally, the degree of deference given the administrator's decision varies accordingly from slight to great depending upon the circumstances surrounding the administrator's decisionmaking process.[349]

2. *Ninth Circuit*

Although early Ninth Circuit case law lacked certainty regarding the degree of deference afforded the decision of a plan administrator acting under a conflict of interest,[350] it eventually adopted the presumptively void test.[351] The court reviews de novo the district court's choice of the standard of review in determining if a plan administrator acted arbitrarily or capriciously.[352] Following the Supreme Court's decision in *Firestone*, the Ninth Circuit reviews an ERISA denial of benefits de novo unless the plan grants the administrator discretionary authority to determine benefit eligibility or construe the terms of the plan in which case the arbitrary and capricious standard is utilized.[353] If, however, the administrator is deemed to have a conflict of interest, a heightened arbitrary and capricious standard applies.[354]

In the Ninth Circuit, a conflict of interest warranting heightened scrutiny may be found to exist by the sole fact that a plan administrator

346. *See* Stvartak v. Eastman Kodak Co., 945 F. Supp. 1532, 1534 (M.D. Fla. 1996), *aff'd*, 144 F.3d 54 (11th Cir. 1998).

347. *See Brown*, 898 F.2d at 1563.

348. *See id.* at 1564 (citing Van Boxel v. Journal Co. Employees' Pension Trust, 836 F.2d 1048, 1052-53 (7th Cir. 1987)).

349. *See id.*

350. *See* Taft v. Equitable Life Assurance Soc'y, 9 F.3d 1469, 1474 (9th Cir. 1993) (recognizing that when the administrator is colored by a conflict of interest, a more stringent version of the abuse of discretion standard is applied but noting that the precise nature of the less deferential review is unclear).

351. *See* Atwood v. Newmont Gold Co., Inc., 45 F.3d 1317, 1322-23 (9th Cir. 1995) (adopting the Eleventh Circuit presumptively void test from *Brown*, 898 F.2d 1556). While the court recognized both the sliding scale and presumptively void tests, it determined that the Eleventh Circuit's presumptively void analysis more closely resembled the methodology of the Ninth Circuit. *See id.* at 1323.

352. *See Taft*, 9 F.3d at 1471. Additionally, the 9th Circuit has determined that the terms "arbitrary and capricious" and "abuse of discretion" are a distinction without a difference. *See id.* at 1471 n.2 (citing Cox v. Mid-America Dairymen, Inc., 965 F.2d 569, 572 n.3 (8th Cir. 1992), *aff'd on appeal after remand*, 13 F.3d 272 (8th Cir. 1993)).

353. *See id.* (citing Firestone Tire and Rubber Co. v. Bruch, 489 U.S. 101, 115 (1989)).

354. *See Atwood*, 45 F.3d at 1322 (holding that a less deferential abuse of discretion is applied when a conflict caused a serious breach of the administrator's fiduciary duty).

has an economic stake in benefit decisions.[355] Additionally, if a party acts in a dual capacity as the plan administrator and as a funding source, an inherent conflict of interest exists, triggering the higher standard.[356] However, the presence of a conflict of interest does not automatically strip all deference given to the administrator's decision.[357]

In order to dismiss the arbitrary and capricious standard and trigger de novo review in situations where a plan administrator with discretionary authority is colored by a conflict of interest, a two-step analysis has been developed.[358] First, the beneficiary who was denied benefits has the burden of providing "material, probative evidence, beyond the mere fact of the apparent conflict, tending to show that the fiduciary's self interest caused a breach of the administrator's fiduciary obligations to the beneficiary."[359] If the beneficiary fails to meet this burden, the traditional arbitrary and capricious standard of review is applied.[360] Second, if the beneficiary proves that a conflict of interest existed, the burden shifts to the plan administrator to show that the conflict did not affect its decision in denying benefits.[361] If the plan administrator cannot rebut this presumption, the administrator's decision is reviewed de novo and without deference to the administrator's tainted exercise of discretion.[362]

If the plan administrator successfully rebuts this presumption, the court utilizes the arbitrary and capricious standard.[363] The decision of the plan administrator is considered to be arbitrary and capricious if the decision is "without any explanation, or construe[s] provisions of the plan in a way that conflicts with the plain language of the plan."[364] When determining if the plan administrator acted arbitrarily and capri-

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355. *See id.* (referring to Watkins v. Westinghouse Hanford Co., 12 F.3d 1517, 1524 (9th Cir. 1993)).

356. *See* Lang v. Long-Term Disability Plan of Sponsor Applied Remote Tech., Inc., 125 F.3d 794, 797 (9th Cir. 1996) (citing *Brown*, 898 F.2d at 1561 (finding that the fact that the insurance company paid benefits from its own assets and was the administrator placed it in perpetual conflict with its profit-making role)).

357. *See id.*

358. *See Atwood*, 45 F.3d at 1323.

359. *Id.*

360. *See id.*

361. *See id.* If the beneficiary provides material evidence that the administrator violated its fiduciary obligation, no deference is given to the presumptively void decision. *See id.*

362. *See id.*

363. *See id.* (finding plaintiff failed to show a breach of fiduciary interest; therefore, the appropriate standard was abuse of discretion).

364. Taft v. Equitable Life Assurance Soc'y, 9 F.3d 1469, 1472 (9th Cir. 1998) (citing Eley v. Boeing Co., 945 F.2d 276, 279 (9th Cir. 1991)). Importantly, the court will construe the plan in accordance with the rules normally applied to insurance policies. *See* Lang v. Long-Term Disability Plan of Sponsor Applied Remote Tech., Inc., 125 F.3d 794, 799 (9th Cir. 1997). In that capacity, the court will apply the doctrine of *contra proferentum*, which requires any disputed plan terms to be interpreted against the drafter. *See id.* (adopting the reasonable definition advanced by the plaintiff).

ciously, the district court is limited to review of the evidence presented to the plan administrator at the time of its decision.[365]

Thus, a heightened arbitrary and capricious standard is employed when the plan administrator is operating under a conflict of interest.[366] However, if the claimant establishes by material, probative evidence that the administrator was acting out of self interest, the burden then shifts to the plan administrator to show its action was not influenced by self-interest.[367] If the plan administrator fails to rebut this finding effectively, its decision is evaluated under the de novo standard of review.[368]

In summary, the presumptively void test contains several unique components, most significantly the burden-shifting framework.[369] However, as in all other circuits, if the plan language grants the plan administrator discretionary authority, then the administrator's decision to deny benefits is reviewed under the arbitrary and capricious standard.[370] If it is determined that the administrator's decision was tainted by a substantial interest, there is a presumption that the decision is void.[371] Importantly, at this point the burden shifts to the administrator to rebut this presumption.[372] If the administrator fails to rebut this presumption successfully, the administrator's decision is reviewed under the de novo standard.[373] Conversely, if the administrator does successfully rebut this presumption, then the arbitrary and capricious standard of review is applied.[374]

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365. *See Taft*, 9 F.3d at 1471 (quoting Jones v. Laborers Health & Welfare Trust Fund, 906 F.2d 480, 482 (9th Cir. 1990)). The court determined that limiting review to the administrative record promoted the goals of ERISA, conformed to the decisions in other circuits, and was consistent with the nature of the arbitrary and capricious standard. *See id.*

366. *See Atwood*, 45 F.3d at 1322.

367. *See id.* at 1323.

368. *See id.*

369. *See id.* (stating once the affected beneficiary proves a violation of the administrator's fiduciary obligation, the plan bears the burden of producing evidence to show that the conflict did not affect its decision to deny benefits).

370. *See id.*

371. *See* Lang v. Long-Term Disability Plan of Sponsor Applied Remote Tech., Inc., 125 F.3d 794, 797 (9th Cir. 1996).

372. *See Atwood*, 45 F.3d at 1323.

373. *See id.*

374. *See id.*

IV. THE EIGHTH CIRCUIT ADOPTION OF THE SLIDING SCALE ANALYSIS IN *WOO V. DELUXE CORPORATION*

A. THE EIGHTH CIRCUIT SLIDING SCALE ANALYSIS

As in every circuit, the Eighth Circuit determines the applicable standard of review in an ERISA claim for denial of benefits through interpretation of the United States Supreme Court opinion in *Firestone*.[375] Accordingly, the threshold issue is whether the plan grants the administrator discretionary authority to determine benefit eligibility or construe the terms of the plan.[376] If the plan provides such discretion, the arbitrary and capricious standard is utilized.[377] There appears to be a requirement in the Eighth Circuit that the plan language must expressly grant the administrator discretionary authority to trigger the arbitrary and capricious standard of review.[378]

The court then reviews de novo the district court's application of the deferential standard of review.[379] An administrator's decision will be upheld under the arbitrary and capricious standard if it is supported by substantial evidence[380] or is determined to be reasonable.[381] However, the administrator's decision is arbitrary and capricious if it is "extraordinarily imprudent or extremely unreasonable."[382] While application of

375. *See* Firestone Tire and Rubber Co. v. Bruch, 489 U.S. 101, 115 (1989). The all too familiar language states that a denial of benefits under ERISA is reviewed de novo unless the plan grants the administrator discretionary authority to determine eligibility for benefits or construe terms of the plan, in which case the applicable standard is abuse of discretion. *See id.* at 114-15.

376. *See* Finley v. Special Agents Mut. Benefit Ass'n, Inc., 957 F.2d 617, 619 (8th Cir. 1992) (holding the first issue to be resolved is whether the plan language gives the board discretionary authority to construe a "confrontational situation"). The Eighth Circuit has uniformly held that the contra insurer rule, which requires that ambiguity in the language of the contract is to be construed against interests of the insurer, violates ERISA provisions. *See* Whiteside v. Metropolitan Life Ins. Co., 798 F. Supp. 1380, 1386 (D. Minn. 1992); *see also Finley*, 957 F.2d at 619 (holding the common rule of construction that ambiguous language in an insurance contract should be reviewed against the drafter in favor of the insured has no place in the de novo construction of an ERISA plan).

377. *See* Wald v. Southwestern Bell Corp. Customcare Med. Plan, 83 F.3d 1002, 1006 (8th Cir. 1996) (holding that the plan indisputably gave the administrator discretion to interpret the plan, so the proper standard was abuse of discretion).

378. *See* Armstrong v. Aetna Life Ins. Co., 128 F.3d 1263, 1265 (8th Cir. 1997) (stating the abuse of discretion is the standard of review if the plan specifically gives the administrator authority to construe its terms); Jader v. Principal Mut. Life Ins. Co., 723 F. Supp. 1338 (D. Minn. 1989) (applying the de novo standard since nothing in the plan gave the administrator express authority to determine benefit eligibility or general term construction).

379. *See* Bolling v. Eli Lilly and Co., 990 F.2d 1028, 1029 (8th Cir. 1993) (citing Bernards v. United of Omaha Life Ins. Co., 987 F.2d 486, 488 (8th Cir. 1993)).

380. *See* Farley v. Arkansas Blue Cross and Blue Shield, 147 F.3d 774, 777 (8th Cir. 1998).

381. *See* Cox v. Mid-America Dairymen, Inc., 965 F.2d 569, 572 (8th Cir. 1992) (stating the administrator's decision is subject to a reasonableness standard rooted in trust law principles), *aff'd on appeal after remand*, 13 F.3d 272, 274 (8th Cir. 1993) (stating the court will affirm a reasonable interpretation of a plan).

382. *See* Lickteig v. Business Men's Assurance Co. of Am., 61 F.3d 579, 583 (8th Cir. 1995).

any of these inquiries is proper, preference has been established for overturning a plan administrator's decision only if it is "without reason, unsupported by substantial evidence or erroneous as a matter of law."[383]

In determining whether the administrator's decision was reasonable, the court considers five factors: 1) whether the administrator's interpretation is consistent with the goals of the plan; 2) whether the administrator's interpretation renders any language in the plan meaningless or internally inconsistent; 3) whether the administrator's decision interpretation conflicts with ERISA substantive or procedural requirements; 4) whether the administrator has consistently interpreted the words in question; and 5) whether the administrator's interpretation is contrary to the clear language of the plan.[384] In reviewing an administrator's decision, all five factors should be applied or an explanation should be given as to why a particular factor is inapplicable.[385] If the administrator's decision is supported by a reasonable explanation, it should not be disturbed, regardless of whether a different reasonable interpretation could have been reached.[386]

In order to apply the arbitrary and capricious standard properly, the reviewing court must be provided the rationale underlying the administrator's discretionary decision.[387] If the administrator fails to provide an adequate explanation of how it reached its decision, the reviewing court must seek a fuller explanation from the administrator and then apply the deferential standard.[388] In deciding if the plan administrator's decision

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383. *See* Donaho v. FMC Corp., 74 F.3d 894, 900 (8th Cir. 1996) (quoting Abnathya v. Hoffmann-La Roche, Inc., 2 F.3d 40, 45 (3d Cir. 1993)) A trustee's decision is reasonable if a reasonable person could have reached a similar decision, rather than if a reasonable person would have reached the same decision. *See id.* at 899. The court further defined "reasonable," explaining that the administrator's decision does not have to be the only sensible interpretation as long as its decision has a "reasoned explanation, based on evidence, for a particular outcome." *Id.* (quoting Krawczyk v. Harnischfeger Corp., 41 F.3d 276, 279 (7th Cir. 1994)). Substantial evidence is defined as "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *Id.* at 900 n.10 (citing Consolidated Edison Co. of N.Y. v. N.L.R.B., 305 U.S. 197 (1938)). In quantifiable terms, "[s]ubstantial evidence requires 'more than a scintilla but less than a preponderance.'" *Id.* (quoting Sandoval v. Aetna Life and Cas. Ins. Co., 967 F.2d 377, 382 (10th Cir. 1992)).

384. *See* Finley v. Special Agents Mut. Benefit Ass'n, Inc., 957 F.2d 617, 621 (8th Cir. 1992) (citing De Nobel v. Vitro Corp., 885 F.2d 1180, 1188 (4th Cir. 1989)); *see also Cox*, 965 F.2d at 572. In *Cox*, the court listed the six factors from the Restatement for consideration in determining whether the administrator abused its discretion. *See id.* (quoting RESTATEMENT (SECOND) OF TRUSTS § 174 cmt. d (1959)). The court indicated that the test articulated in *Finley* was essentially an application of the Restatement factors. *See id.* (citing *Finley*, 957 F.2d at 621).

385. *See Lickteig*, 61 F.3d at 584 (encouraging district courts to apply all five factors or explain why a certain factor does not apply).

386. *See* Cash v. Wal-Mart Group Health Plan, 107 F.3d 637, 641 (8th Cir. 1997) (citing *Cox*, 965 F.2d at 572).

387. *See Cox*, 965 F.2d at 574 (holding that ERISA principles require that administrators adequately explain the basis for their discretionary decisions).

388. *See* Bernards v. United of Omaha Life Ins. Co., 987 F.2d 486, 488-89 (8th Cir. 1998) (citing

was arbitrary or capricious, the court is limited to a review of the evidence before the administrator when its decision was made.[389] Moreover, in accord with trust law, the reviewing court is not permitted to reject an administrator's discretionary decision simply because the court disagrees with the conclusion.[390] Thus, the deferential arbitrary and capricious standard shows that courts are hesitant to interfere with the administration of a pension plan.[391]

However, certain situations may exist in which factors outside the administrator's actual decision mandate the application of a less deferential arbitrary and capricious standard.[392] In order to trigger heightened arbitrary and capricious review, the beneficiary must present material, probative evidence demonstrating that: 1) a palpable conflict of interest or a serious procedural irregularity existed, and it 2) caused a serious breach of the plan administrator's fiduciary duty to the plan beneficiary.[393] In order to satisfy the second step of this analysis, the beneficiary need only show that the conflict or procedural irregularity had some connection to the substantive decision reached by the administrator.[394]

BOGERT & BOGERT, *supra* note 102, § 560, at 201-04). For example, in *Bernards*, the cryptic letters from the plan administrator denying plan benefits failed to provide sufficient rationale to permit judicial review of the decision. *See id.* at 488.

389. *See* Collins v. Central States, S.E. and S.W. Areas Health and Welfare Fund, 18 F.3d 556, 560 (8th Cir. 1994) (citing Oldenburger v. Central States S.E. and S.W. Areas Teamster Pension Fund, 934 F.2d 171, 174 (8th Cir. 1991)). Courts are also discouraged from considering additional evidence not before the administrator even when the administrator's decision is reviewed under the de novo standard. *See* Donatelli v. Home Ins. Co., 992 F.2d 763, 765 (8th Cir. 1993). This is to ensure the expeditious judicial review of ERISA benefit decisions and prevent the courts from becoming substitute plan administrators. *See id.*

390. *See Cox*, 965 F.2d at 572 (quoting BOGERT & BOGERT, *supra* note 102, § 560, at 201-04) (stating it is not necessarily an abuse of discretion if the court believes an ordinary prudent person would not have reached the same conclusion as the discretionary decision)); *see also* Bremer v. Hartford Life and Accident Ins. Co., 16 F. Supp. 2d 1057, 1060 (D. Minn. 1997) (stating the court will uphold the administrator's decision if it is reasonable, even if it is not the best interpretation possible).

391. *See* Maune v. International Brotherhood of Elec. Workers, Local No. 1, Health and Welfare Fund, 83 F.3d 959, 963 (8th Cir. 1996) (quoting Cox v. Mid-America Dairymen, Inc., 13 F.3d 272, 274 (8th Cir. 1993)).

392. *See* Buttram v. Central States, S.E. and S.W. Areas Health and Welfare Fund, 76 F.3d 896, 899-900 (8th Cir. 1996). In *Buttram*, the court enlisted the common law of trusts as a guide to application of a stricter scrutiny and found the following to be "external factors": 1) where the administrator labors under a conflict of interest; 2) where the administrator acts dishonestly; 3) where the administrator acts under an improper motive; and 4) where the administrator fails to use judgment in reaching a decision. *Id.; see also* RESTATEMENT (SECOND) OF TRUSTS § 174 cmt. d, f, g, h (1959).

393. *See* Woo v. Deluxe Corp., 144 F.3d 1157, 1160 (8th Cir. 1998) (adding "a palpable conflict of interest" to the *Buttram* test); *see also Buttram*, 76 F.3d at 900 (citing Atwood v. Newmont Gold Co., 45 F.3d 1317, 1322-23 (9th Cir. 1995) (finding the traditional abuse of discretion standard applies unless the affected beneficiary comes forward with evidence indicating that the conflicting interest caused the administrator to breach its fiduciary duty to the beneficiary)). The court in *Buttram* further noted that absent material, probative evidence, beyond a mere irregularity, tending to show that the administrator breached its fiduciary obligation, the court will apply the traditional abuse of discretion analysis to discretionary administrator's decisions. *Buttram*, 76 F.3d at 900 (citing Cuddington v. Northern Ind. Pub. Serv. Co. (NIPSCO), 33 F.3d 813, 816 (7th Cir. 1994) (requiring plaintiff to present specific evidence of a conflict of interest)).

394. *See Woo*, 144 F.3d 1157 (citing *Buttram*, 76 F.3d at 901 (holding that existence of a procedural irregularity alone will not trigger the heightened standard; rather, the irregularities must have

The analysis surrounding an administrator's conflict of interest has experienced an inconsistent evolution in the Eighth Circuit. In *Jader v. Principal Mutual Life Insurance Co.*,[395] the district court recognized that the arbitrary and capricious standard is not rigid when an administrator is operating under a conflict of interest.[396] The standard, however, may be applied more penetratingly if there is a suspicion that the administrator lacks partiality, but less penetratingly if there is a smaller suspicion of the administrator's partiality.[397] The *Jader* court found that the administrator had a strong conflict of interest because it operated both as the administrator of the plan and as the insurer responsible for paying the claims.[398] Therefore, the administrator's decision was arbitrary and capricious.[399] Thus, at this juncture, it appeared the Eighth Circuit would perhaps lean toward utilizing the sliding scale analysis.[400]

In *Whiteside v. Metropolitan Life Insurance Co.*,[401] however, the district court appeared to slide towards the presumptively void analysis.[402] Since the court in *Whiteside* determined that the administrator's interpretation of the plan was not wrong, however, it was unnecessary to invoke the burden-shifting component of the presumptively void test.[403] In the Eighth Circuit decision of *Armstrong v. Aetna Life Insurance Co.*,[404] the court recognized both the sliding scale and the presumptively void analysis.[405] Indicating that it was informed by the Eleventh Circuit's presumptively void test, the court ultimately applied the de novo stan-

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some connection to the substantive decision reached)).

395. 723 F. Supp. 1338, 1341 (D. Minn. 1989).

396. *See* Jader v. Principal Mut. Life Ins. Co., 723 F. Supp. 1338, 1341 (D. Minn. 1989) (quoting Lowry v. Bankers Life and Cas. Retirement Plan, 871 F.2d 522, 525 n.6 (5th Cir. 1989), *cert. denied*, 493 U.S. 852 (1989)). *Cf.* Farley v. Arkansas Blue Cross and Blue Shield, 147 F.3d 774, 776 (8th Cir. 1998) (finding that not every allegation of impartiality alters the standard of review).

397. *See Jader*, 723 F. Supp. at 1341 (stating that in conflict of interest situations the arbitrary and capricious standard may be "more penetrating, the greater is the suspicion of partiality, less penetrating, the small the suspicion is").

398. *See id.* at 1342 (remanding the case for consideration as to the administrator's conflict of interest and lack of diligence in evaluating the claim).

399. *See id.*

400. *See id.*

401. 798 F. Supp. 1380 (D. Minn. 1992).

402. *See* Whiteside v. Metropolitan Life Ins. Co., 798 F. Supp. 1380, 1387 n.11 (D. Minn. 1992). In evaluating a conflict of interest, the court found the holding in *Brown v. Blue Cross and Blue Shield of Alabama, Inc.*, instructive. *See id.* (citing Brown v. Blue Cross and Blue Shield of Ala., Inc., 898 F.2d 1556 (11th Cir. 1990), *cert. denied*, 498 U.S. 1040 (1991). As previously noted, the Eleventh Circuit's presumptively void analysis utilizes a burden-shifting approach. *See Brown*, 898 F.2d at 1566-67.

403. *See Whiteside*, 798 F. Supp. at 1387 n.11.

404. 128 F.3d 1263 (8th Cir. 1997).

405. *See* Armstrong v. Aetna Life Ins. Co., 128 F.3d 1263, 1265 (8th Cir. 1997). The court acknowledged previous decisions addressing the variation of the abuse of discretion analysis where "procedural irregularity" is an issue, but it disregarded those decisions' application of a heightened arbitrary and capricious standard. *See id.* at 1265 n.1.

dard of review.[406] The court explained its use of the de novo standard by finding that the administrator was in "perpetual conflict" because it acted in a dual capacity as both the plan administrator and insurer, thereby warranting a higher level of scrutiny.[407] The court held that the administrator, as insurer, had an obvious interest in minimizing its claim payments and failed to act "solely in the interest of the participants and beneficiaries," as required by ERISA.[408] Therefore, the administrator's decision was allowed no deference by the *Armstrong* court.[409] The avoided, perpetual conflict of interest question was finally resolved by the Eighth Circuit in *Woo v. Deluxe Corp.*[410]

B. *WOO V. DELUXE CORPORATION*

Woo involved a denial of disability benefits by Deluxe Corporation (Deluxe) and Hartford Life Insurance Company (Hartford).[411] Beverly Woo worked for Deluxe from February 1978 through November 1993, when she resigned from her position.[412] Unbeknownst to Deluxe, Woo had been diagnosed with multiple sclerosis in 1980; it had remained stable during the course of her employment and had not interfered with her activities.[413] In the summer of 1993, Woo began experiencing medical problems, unrelated to her multiple sclerosis, which made her work duties increasingly difficult to complete.[414] As a result, Woo's work performance progressively deteriorated.[415]

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406. *See id.* at 1265.

407. *See id.* (citing *Brown*, 898 F.2d at 1561).

408. *Id.* (quoting 29 U.S.C. § 1104(a)(1) (1994)).

409. *See id.* Importantly, Justice Beam dissented, stating that based on the Supreme Court decision in *Firestone*, it was difficult, if not impossible, to apply any standard other than the sliding scale analysis. *See id.* at 1267 (Beam, J., dissenting); *see also* Firestone Tire & Rubber Co. v. Bruch, 489 U.S. 101, 115 (1989). The court in *Layes v. Mead Corp.* successfully avoided addressing the *Armstrong* de novo review on the grounds that it involved only a question of procedural irregularities, not conflict of interest. Layes v. Mead Corp., 132 F.3d 1246, 1250 n.8 (8th Cir. 1998); *see Armstrong*, 128 F.3d at 1265. This avoidance was accomplished by holding that since the plaintiff did not raise the issue of a conflict of interest when the administrator was both the administrator and insurer, the court did not need to resolve the question. *See Layes*, 132 F.3d at 1250 n.8.

410. 144 F.3d 1157 (8th Cir. 1998).

411. *See* Woo v. Deluxe Corp., 144 F.3d 1157, 1160 (8th Cir. 1998). Both Hartford and Deluxe were parties to the litigation because Deluxe sponsored and funded the long-term disability plan during the first two years of qualified disability and Hartford insured the plan for the subsequent period of disability. *See id.* at 1161.

412. *See id.* at 1160. Woo indicated in her exit questionnaire that she did not consider her resignation a voluntary separation. *See id.* However, the plan manager who conducted the exit interview indicated in his notes that Woo was leaving to "pursue other opportunities." *See id.*

413. *See id.* at 1159. Woo never informed Deluxe of her multiple sclerosis because she did not want her abilities questioned. *See id.* In fact, Woo kept her condition a secret from many close relatives, including her children. *See id.*

414. *See id.*

415. *See id.*

On February 15, 1994, three months following her resignation, Woo was diagnosed with scleroderma in addition to the multiple sclerosis.[416] Woo's treating physicians found that she had been disabled as early as the summer of 1993, prior to her November 1993 resignation.[417] Due to this determination of disability, Woo applied for Social Security Disability benefits and benefits under the Deluxe Group Long-Term Disability Plan, an ERISA welfare benefit plan.[418] Woo's application for long-term disability was received in March 1995, more than one year following her resignation.[419] Woo's application for social security benefits was approved, but Hartford denied her application for long-term benefits based on its independent assessment and conclusion that Woo was not disabled when she resigned from Deluxe.[420]

The *Woo* court determined that Hartford had failed to use proper judgment in denying Woo's disability benefits and had been acting under a conflict of interest.[421] In determining the proper standard of review, the court determined that the disability plan language afforded Hartford discretionary authority to determine eligibility for benefits.[422] Thus, the baseline standard was arbitrary and capricious.[423] Woo asserted, however, that Hartford's decision to deny benefits should not be reviewed under the traditional arbitrary and capricious standard because of procedural irregularities and Hartford's conflict of interest.[424] The court concluded that in order for Woo to trigger a less deferential review, she must present material, probative evidence demonstrating that 1) a

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416. *See id.* at 1160.

417. *See id.* After reviewing Dr. Mullin's medical records, Woo's treating neurologist, Dr. Schapiro, also opined that she was disabled from the combination of the scleroderma and multiple sclerosis in September of 1993. *See id.*

418. *See id.*

419. *See* Brief of Appellees Deluxe Corporation & Deluxe Group Long Term Disability Benefit Plan at 5, Woo v. Deluxe Corp., 144 F.3d 1157 (8th Cir. 1998) (No. 97-2055).

420. *See Woo*, 144 F.3d at 1160.

421. *See id.* at 1162. Therefore, the court reversed the denial of benefits and remanded it to the district court with directions to enter judgment awarding Woo long-term disability benefits. *See id.*

422. *See id.* at 1160. This determination was reached as Woo did not dispute the granting of discretion to Hartford. *See id.*

423. *See id.*

424. *See id.* The procedural irregularity discussed by the court was Hartford's failure to employ a scleroderma expert to review Woo's claim considering it is an uncommon disease. *See id.* (citing Hightshue v. AIG Life Ins. Co., 135 F.3d 1144, 1148 (7th Cir. 1998)). In *Hightshue*, the Seventh Circuit stated that when it is possible to question a fiduciary's loyalty, it is obligated, at a minimum, to conduct an independent scrupulous and intensive investigation of the possible options to insure it acts in the best interests of the plan beneficiaries. *Hightshue*, 135 F.3d at 1148. The *Hightshue* court determined that seeking the advice of an independent expert was evidence of a thorough investigation, and if the fiduciary made sure the expert was qualified, provided the expert with complete and accurate information, and determined that it could reasonably rely on the expert's advice under the circumstances, the fiduciary's decision would be upheld, irrespective of the conflict of interest. *See id.* (citing Howard v. Shay, 100 F.3d 1484, 1488 (9th Cir. 1996), *cert. denied*, 520 U.S. 1237 (1997)).

palpable conflict of interest or serious procedural irregularity existed that 2) caused a serious breach of Hartford's fiduciary duty to her.[425] To satisfy the second step of this test, the court indicated that Woo had to show only that the conflict or procedural irregularity had some connection to the ultimate substantive decision.[426]

In considering this test, the *Woo* court held that Hartford had a financial conflict because it would be responsible for paying all subsequent disability benefits following the initial two years of benefits.[427] As a result, Hartford received a direct financial benefit as the plan insurer in denying Woo's disability benefits.[428] Based on the financial benefit that Hartford would receive, along with its failure to seek an independent medical evaluation of Woo, the court held that Woo had shown a sufficient connection between Hartford's financial conflict and the denial of benefits to trigger a less deferential standard of review.[429]

The *Woo* court also found that Hartford reached its decision without reflection and that it failed to use proper judgment or thoroughly investigate Woo's claim because it merely had an in-house medical consultant review the claim rather than having a scleroderma expert review her medical records and conduct an independent medical evaluation.[430] The court concluded these facts constituted a serious procedural irregularity that had a sufficient connection to the administrator's decision to trigger a less deferential review.[431]

Recognizing that a conflict of interest should be weighed as a factor in deciding whether an administrator acted arbitrarily and capriciously in its denial of benefits, the *Woo* court considered both the sliding scale and presumptively void tests.[432] The court adopted the sliding scale ap-

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425. *See Woo*, 144 F.3d at 1160. This test is a modification of the test derived from *Buttram v. Central States, Southeast and Southwest Areas Health and Welfare Fund.* Buttram v. Central States, S.E. and S.W. Areas Health and Welfare Fund, 76 F.3d 896, 900 (8th Cir. 1996). The *Buttram* test is identical, with the exception of the added words "a palpable conflict of interest." *Id.*

426. *See Woo*, 144 F.3d at 1161.

427. *See id.*

428. *See id.* While the court noted that not every funding conflict of interest alone warrants heightened review, it implied that the insurer must take a positive step to limit the conflict, such as controlling a potential underwriting loss with a retrospective premium, thereby decreasing the impact of a financial conflict. *See id.* at 1161 n.2.

429. *See id.* at 1161.

430. *See id.*; *see also* Hightshue v. AIG Life Ins. Co., 135 F.3d 1144, 1148 (7th Cir. 1998) (seeking independent expect advice is evidence of a thorough investigation if the fiduciary has followed the criteria listed by the court); RESTATEMENT (SECOND) OF TRUSTS § 187 cmt. h (1959) (stating the court will interpose if the trustee, without knowledge or inquiring into the relevant circumstances and merely as a result of its arbitrary decision, fails to exercise judgment).

431. *See Woo*, 144 F.3d at 1161 (citing *Buttram*, 76 F.3d at 901).

432. *See id.* (quoting Firestone Tire and Rubber Co. v. Bruch, 489 U.S. 101, 115 (1989)); *see also* Chambers v. Family Health Plan Corp., 100 F.3d 818, 825-27 (10th Cir. 1996) (utilizing the sliding scale analysis); Brown v. Blue Cross and Blue Shield of Ala., Inc., 898 F.2d 1556, 1566-67 (11th Cir. 1990), *cert. denied*, 498 U.S. 1040 (1991) (adopting the presumptively void approach).

proach, reasoning that it more closely comports with the Supreme Court's *Firestone* decision because it requires courts to apply the abuse of discretion rationale while still considering the conflict or procedural irregularity when evaluating an administrator's discretionary decision.[433] The court indicated that the arbitrary and capricious standard is inherently flexible, allowing courts to make adjustments according to the circumstances.[434] Additionally, the *Woo* court wrote that the sliding scale analysis more closely followed its decision in *Armstrong v. Aetna Life Insurance Co.*,[435] because egregious circumstances allow the courts latitude to give no deference to the administrator's decision.[436]

Upon adopting the sliding scale test, the *Woo* court applied it to Hartford's decision and found that it failed to use proper judgment which, combined with its financial conflict, amounted to egregious conduct.[437] The court therefore applied a standard that required the administrator's decision to be supported by substantial evidence bordering on a preponderance.[438] Although not specifically stated, the court essentially extended little to no deference to Hartford's decision to deny Woo's long-term disability benefits.[439] The court based this finding on the fact that under the sliding scale analysis, the evidence supporting the administrator's decision must increase in proportion to the seriousness of the conflict or procedural irregularity.[440]

Since Woo did not submit her application for disability benefits while still employed by Deluxe, Hartford had no opportunity to conduct a medical evaluation of Woo during the insured period.[441] As a result, Hartford based its decision on the information available to the administrator at the time of determining claim eligibility.[442] Following a review of the evidence, the court determined it was insufficient to support Hartford's conclusion that Woo was not disabled when she resigned from Deluxe.[443]

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433. *See Woo*, 144 F.3d at 1161; *see also Firestone*, 489 U.S. at 115.
434. *See Woo*, 144 F.3d at 1161 (citing *Chambers*, 100 F.3d at 827).
435. 128 F.3d 1263, 1265 (8th Cir. 1997).
436. *See Woo*, 144 F.3d at 1161-62.
437. *See id.* at 1162.
438. *See id.*
439. *See id.*
440. *See id.* (citing Ellis v. Metropolitan Life Ins. Co., 126 F.3d 228, 233 (4th Cir. 1997)).
441. *See id.*
442. *See id.* The available information included Woo's claim form, medical records, opinions of her physicians, her resignation papers, the opinion of Hartford's in-house medical consultant, and affidavits from Deluxe co-workers. *See id.*
443. *See id.*

The court dismissed all of Hartford's reasons supporting its denial of Woo's disability application.[444] The court was not persuaded by Hartford's argument that Woo failed to mention her condition as the reason for leaving her employment with Deluxe since Woo had never previously disclosed her health problems.[445] Additionally, it was unavailing for Hartford to assert that Woo's treating physicians never determined that she was disabled prior to leaving Deluxe, because Woo had never asked for a disability rating during her employment with Deluxe.[446] The court relied heavily on the opinions of Woo's treating physicians and Hartford's failure to have either Woo herself or her medical records reviewed by a scleroderma expert.[447] Accordingly, the court found insufficient evidence to support Hartford's determination that Woo was not disabled when she left Deluxe, and the court awarded Woo long term disability benefits.[448]

Thus, the court ruled that Hartford's decision to deny Woo's disability benefits was arbitrary and capricious.[449] Hartford's financial interest in denying Woo's disability benefits triggered a modified abuse of discretion standard of review.[450] The court determined that Hartford's administration of Woo's claim was egregious.[451] As a result, Hartford's decision was essentially given no deference, although this was not directly acknowledged by the court.[452] Therefore, a finding that the plan administrator's conduct was egregious in denial of a beneficiary's benefits allows the courts within the Eighth Circuit to apply a de novo standard of review when the plan affords the administrator discretionary authority but is operating under a conflict of interest.[453]

V. CONCLUSION

As illustrated by the above discussions regarding the extreme division among the circuits in analyzing an ERISA conflict of interest

444. *See id.*
445. *See id.*
446. *See id.* The court noted that the retrospective disability determinations made by Woo's physicians further diluted this basis. *See id.* The court relied on the holding in *Dodson v. Woodmen of the World Life Ins. Soc'y* that more deference is given to the opinion of a person's treating physician. *See id.* (citing Dodson v. Woodmen of the World Life Ins. Soc'y, 109 F.3d 436, 439 (8th Cir. 1997)).
447. *See id.* (citing Gunderson v. W.R. Grace & Co. Long Term Disability Income Plan, 874 F.2d 496, 499 (8th Cir. 1989) (holding there was not substantial evidence to support the administrator's denial of benefits because it terminated benefits prior to obtaining a vocational expert's opinion concerning the plaintiff's capabilities)).
448. *See id.*
449. *See id.* at 1163.
450. *See id.* at 1161.
451. *See id.* at 1162.
452. *See id.*
453. *See id.*

situation, this highly litigated area is in desperate need of Supreme Court guidance. This is evidenced by the many different approaches to a conflict of interest situation, even among circuits theoretically applying the same test.[454] This sheer lack of consistency results in a wide range and degree of decisions leaving parties in ERISA actions to speculate about the possible outcome.[455] Obviously, it is necessary to establish some degree of continuity throughout the circuits to achieve Congress' expressed purpose of uniformity in ERISA actions.[456]

Significantly, reviewing a denial of benefits under a de novo standard of review when the plan grants the administrator discretionary authority is contrary to the United States Supreme Court's decision in *Firestone*.[457] It is this writer's opinion that careful review of the *Firestone* decision indicates that the Supreme Court intended the expressed standards of review to be applied in the designated circumstances "regardless of whether the administrator or fiduciary is operating under a possible or actual conflict of interest."[458] It follows that the arbitrary and capricious standard of review is the appropriate standard when reviewing decisions by a plan administrator who is granted discretionary authority by the plan, and the standard should not be modified to de

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454. *Compare* Ellis v. Metropolitan Life Ins. Co., 126 F.3d 228, 233 (4th Cir. 1997) (stating even if the administrator is found to be acting under a conflict of interest, the court will not, under any circumstances, deviate from the abuse of discretion standard), *with Woo*, 144 F.3d at 1162 (holding where the administrator's actions are found to be egregious, its decision is given no deference; in other words, it is reviewed under a de novo standard even in situations where the plan grants the administrator discretionary authority).

455. *Compare* Mers v. Marriott Int'l Group Accidental Death and Dismemberment Plan, 144 F.3d 1014, 1020 (7th Cir.), *cert. denied*, 119 S. Ct. 372 (1998) (finding the mere fact that the administrator receives a financial gain in denying a claim does not automatically infer a conflict of interest), *with* Brown v. Blue Cross and Blue Shield of Ala., Inc. 898 F.2d 1556, 1561 (11th Cir. 1990), *cert. denied*, 498 U.S. 1040 (1991) (holding an inherent conflict of interest exists where the source of funding of the plan also serves as the administrator and claims are paid directly from the funding source's assets).

456. *See* ERISA, H.R. 93-533, 93d Cong., 2d Sess. (1974), *reprinted in* 1974 U.S.C.C.A.N. 4639, 4650.

457. *See* Firestone Tire and Rubber Co. v. Bruch, 489 U.S. 101, 114-15 (1989). The opinion states in relevant part, "[A] denial of benefits challenged under § 1132(a)(1)(B) is to be reviewed under a de novo standard unless the benefit plan gives the administrator or fiduciary authority to determine eligibility for benefits or to construe the terms of the plan." *Firestone*, 489 U.S. at 114-15. Further, "[I]f a benefit plan gives discretion to an administrator or fiduciary who is operating under conflict of interest, that conflict must be weighed as a 'facto[r] in determining whether there is an *abuse of discretion*." *Id.* (emphasis added).

458. *Firestone*, 489 U.S. at 115. This is supported by the Supreme Court's statement following its determination of the appropriate standards of review: "[B]ecause we do not rest our decision [regarding the applicable standards of review in an ERISA action] on the concern for impartiality . . . we need not distinguish between types of plans or focus on the motivation of plan administrators and fiduciaries." *Id.* Further, although the Supreme Court adopted the standards of review upon reflection of trust law, the language of the opinion indicates that the Supreme Court did not intend the standard of review to advance to de novo from arbitrary and capricious if the plan grants the administrator discretionary authority. *See id.*

novo.[459] Accordingly, the circuits that have adopted the traditional sliding scale analysis that does not deviate from the arbitrary and capricious standard, regardless of the degree of the administrator's conflict, more accurately reflect the Supreme Court's intent in *Firestone*.[460] While the decision in *Woo* purports to have adopted the sliding scale analysis, it essentially allows the courts to give an administrator's decision absolutely no deference if its conduct is determined by the court to be egregious.[461] Additionally, the Eighth Circuit has strayed from congressional intent in its purported adoption of the sliding scale analysis in *Woo*.[462] Under the guise of a sliding scale analysis, the Eighth Circuit has modified this test to such an extent that it allows itself to go beyond the intended arbitrary and capricious standard and apply the de novo standard.[463] In summary, the Eighth Circuit decision in *Woo* further supports the opinion that the ERISA conflict of interest analysis is a prime area of law ready to be granted certiorari by the United States Supreme Court.[464]

Nola A. Kohler[465]

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459. *See id.*

460. *See id.*

461. *See Woo*, 144 F.3d at 1162.

462. *Id.* at 1161.

463. *See id.* at 1162 (giving the administrator's decision no deference because the court determined its actions to be egregious).

464. *See id.*

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